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THE

Weekly Reporter,

APPELLATE HIGH COURT.

CONTAINING

DECISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, viz., IN CIVIL, REVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE CALCUTTA AND MOFUSSIL SMALL CAUSE COURTS AND THE RECORDERS' COURTS; TOGETHER WITH RULES AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH COURT, AND CIRCULAR ORDERS OF THE BOARD OF REVENUE; ALSO DECISIONS OF HER MAJESTY'S PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

BY D. SUTHERLAND, MIDDLE TEMPLE.

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(4) Where, in special appeal, the Lower Appellate Court, though considering the —— of the witnesses in detail, does not meet the first Court's judgment in a single point, the latter Court's decision is restored ... 135

(5) Where, on the day fixed for the final determination of a case, the —— is found not sufficient to enable the Court to come to a satisfactory decision, the Court is bound to postpone further hearing for the production of ——, unless the failure to do so is without sufficient cause ... 226

(6) Where a document is named by plaintiff as the best —— in his favor, he ought not in its absence to be allowed to give any other —— until that document is accounted for ... 262

(7) The circumstance that a copy of a document has been obtained from the office of a Registrar of Deeds does not make that registered document ——, or render it operative against the persons who appear to be affected by its terms 265

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(1) Where ryots swear to have got their pottahs from the hands of the person who professed to sign them, this is held under ——, s. 73, as "proving to the satisfaction of the Court" that the signatures were those of the lessors ... 6

(2) The purchaser at a sale in execution of a decree is held to be "representative in interest" of the judgment-debtor within the meaning of the ——, s. 21 ... 148

(3) Section 33 does not apply to the deposition of a witness in a former suit which is sought to be used against him in a subsequent suit in which he is a defendant, not as evidence between the parties, but as admission against himself ... 414

(4) The —— does not require the writer of a document to be examined as a witness; nor does s. 67 require the subscribing witnesses to a document to be produced ... 429

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EXECUTION.

(1) Where a mortgagee having petitioned for sale under a decree for foreclosure, E and P come forward to claim under conveyances made by the judgment-debtor *pendente lite*, and the Moonsiff orders the sale of the rights and interests of the judgment-debtors, HELD that the sale is inoperative and the Moonsiff's order inapplicable, and that the decree-holder has a right to the property sold which had been originally pledged to him. E and P could only take the property as subject to the rights of the parties to the suit, and the Moonsiff should have treated them as the judgment-debtors ... 14

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(2) The representative of a deceased person in whose favor a decree has been made cannot claim —— as a right, but must satisfy the Court that he should be allowed satisfaction of the decree; and the Court cannot determine the question without hearing the opposite side ... 31

(3) Where —— proceedings are struck off, the act means a complete termination of the case and the removal of any attachment therein; but the restoration of the proceedings does not necessarily imply the restoration of the attachment. 66

(4) Where a decree-holder, pending appeal, gives a security-bond, undertaking, if the decision of the first Court is reversed or modified by the Appellate Court, to make good any property taken by him in ——, how the bond must be construed ... 82

(5) A mere verbal error in proceedings in —— of a decree, if there is no doubt as to the Court's intentions, does not defeat the auction-purchaser's right ... 93

(6) An objection to the sufficiency of the notice of —— should be taken at the earliest opportunity; it cannot be raised after the —— sale, where the process of —— was known to the judgment-debtor 148

(7) Where the purchaser of property sold in —— fails to pay up, and the Moonsiff allows the property to be sold again and directs the debtor, in the event of the property fetching a less price than at the former sale, to realize the difference from the first purchaser, HELD that as the defaulting purchaser was not before the Court, the Moonsiff's order was rightly set aside in appeal ... 149

(8) Where a decree-holder on selling the first of several attached properties finds the price sufficient to cover his debts and proceeds no further, and the purchaser fails to pay up, the judgment-creditor may proceed on his decree against any other property of the debtor ... *ib.*

(9) Where in an —— sale under a decree against K and D upon a debt due by D's father, only the rights and interests of K appeared to have been expressly passed, and the judgment-creditor took possession of the entire property without complaint from D, and many years after D's death her

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heirs sold a share of the property to the plaintiffs who sued for possession, the High Court held that the plaintiffs obtained no immediate right to the property by the conveyance from D's heirs.

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(10) Where a judgment-creditor sets about bringing back the property of the judgment-debtor which has been made away with, the question whether his action is a proceeding to enforce the decree is one, not of law, but of fact, to be determined by the subsequent conduct of the judgment-creditor as showing a *bonâ-fide* intention to execute or otherwise ... 188

(11) Where a judgment-creditor admits having obtained possession of a portion of the land without opposition from the judgment-debtor the *onus* lies on him to show that he was unable to obtain possession of the remainder ... 241

(12) The filing of a petition for —— if done *bonâ fide*, which the judgment-creditor has however no power of enforcing, saves the decree within the words of Act XIV. of 1859, s. 20 ... 244

(13) A suit to recover property alleged to have been sold in —— by a Court which had no jurisdiction, is not barred by Act VIII. of 1859, s. 257 ... 291

(14) Under Act IX of 1871, Schedule No. 167, an application for executing a decree is not a proper one unless it is in accordance with the Code of Civil Procedure, s. 212... 309

(15) Where a transfer of a decree for —— is made without the knowledge of the judgment-debtor, his remedy is to apply to the Court to which the decree has been transferred to stay proceedings until he can go to the original Court for his full remedy ... 330

(16) When a copy of a decree or of an order for —— is transmitted by the Judge of one district to that of another for the purpose specified in Act VIII. of 1859, s. 287, the Judge of the latter district cannot transmit it to a third district. If complete execution cannot be had in the second district, the decree-holder should have his decree re-transmitted to the Court, whose duty it is to execute it, and there obtain a fresh certificate to any other district where —— is practicable ... 337

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(17) Where no objection was taken in the first Court to the share to the wassilat to which the decree-holders are entitled under the decree, the Judge is wrong in amending the Moonsiff's decree with reference to the share ... 338

(18) Where the judgment-debtors in a decree for wassilat take an objection for the first time in appeal, the Judge is bound to dispose of the decree-holder's objections under s. 248, Act VIII. of 1859 *ib.*

(19) Where a Collector's decree is transferred to a Civil Court for ——, the effect is to make it as it were a case of —— on a decree of that Court, and the High Court is bound to assume that the lower Court has acted properly and with jurisdiction, and its appellate jurisdiction follows as a matter of course ... 412

(20) The judgment-creditor of a decree-holder is not warranted by the Code of Civil Procedure to call upon the Court to execute his judgment-debtor's decree as if he himself were the decree-holder 419

(21) In applying under Act VIII. of 1859, s. 210, for ——, the judgment-creditor should make it quite clear how he claims the benefit of s. 210, quite independently of the particulars required by s. 212 ... 420

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FARMING RENTS.
See Haut (1)

FIRST HEARING.
See Act VIII. of 1859 (2)

FRAUD.
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(1) A suit by a co-sharer for arrears of rent which she had heretofore received in proportion to her share, but which she alleged now to be withheld by the ryot in collusion with the other co-sharers who were also made defendants, was held to be properly maintainable ... 46

(2) In a suit brought by one of the shareholders to set aside the sale of property held by several shareholders in which he made the other co-sharers defendants, but asked to have the possession of his own share, valuing the suit with reference to that share only, and framing it so as to bring it in a Court in which he could not have brought a suit to set aside the sale of the entire property:

HELD that plaintiff was not competent to sue in that way. The cause of action was the sale of the whole property, and the suit ought to have been framed and valued accordingly, and brought in such a Court that the rights of all the parties interested in setting aside the sale might be declared in one suit ... 68

(3) In a suit for possession of land brought against a tenant who is really a trespasser, the defendant merely by alleging tenancy in his written statement does not preclude himself from setting up the defence of the law of limitation ... 70

(4) A zemindar who has obtained a decree for arrears of rent of a transferable tenure is entitled to sell the tenure; and a person who has obtained a transfer of such tenure, which he has not registered, and cannot show a sufficient cause for not registering it, is bound by the sale, and cannot set up a title which he has acquired by a previous sale ... 94

(5) Where a landlord sues a ryot for arrears of rent alleged to be due under a kubooleut, and the Court finds that such kubooleut has not been executed by the ryot, but it appears notwithstanding that the ryot occupied the land under the zemindar, the landlord's right to have a further trial of the question whether any rent, and how much, is due will depend upon the claim stated in the plaint. If that claim is in the alternative, and the ryot thus has notice that, on failure to prove the kubooleut the landlord will claim rent for the occupation of the land, the landlord is entitled to have that issue tried. But, if a claim for rent on account of such occupancy is not in the plaint, the landlord is not so entitled.

It is in the discretion of the Court to amend the plaint or the issues and when the admission has been from inadvertence or mistake, it would generally be proper to do so ... 208

(6) An Appellate Court has no power under the Code of Civil Procedure to refer a case to arbitration even on consent of the parties ... 210

(7) Orders made by the High Court under s. 15 of the High Courts Act are subject to an appeal to Her Majesty in Council ... 263

(8) Amongst Sudras in Bengal no ceremonies are necessary to make a valid adoption in addition to the giving and taking of the child in adoption ... 285

(9) HELD (Jackson, J., *dissentiente*) that an Additional Judge comes within the meaning of Act VIII. (B.C.) of 1869, s. 102, and that an appeal does not lie from his decision in cases of the nature described in that section any more than from that of a District Judge ... 320

(10) In a suit for possession of land by adjudication of the right to settle where plaintiff alleges that he is the rightful owner of the lands which have been resumed by the Government, but that the defendant, by false allegation of ownership and of possession, induced the Revenue Authorities to enter into settlement with him, plaintiff is entitled to an adjudication of his right to settlement.

It is not discretionaf with the Collector under such circumstances to settle the lands with any person he pleases, nor is such settlement final as regards all claims:

HELD (Markby, J., expressing no opinion) that, in a suit like the present, the Governmentought to be made a party ... 327

(11) The suit was to recover principal and interest under the terms of an ekrar which was as follows:—

Plaintiff agreed to advance Rs. 20,000 to defendants who were to give him as security for repayment with interest at 18 per

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cent. per annum, an ijara for a term of ten years; one-fourth of the profits to be taken by plaintiff for the interest, one-half of the remainder in reduction of the principal, and the remaining half to be received by defendants. It was also stipulated that if the defendants failed to give the ijara, they should repay the advance with interest at 75 per cent. per annum; and that if the plaintiff would not accept the ijara, he should receive back his money without interest within six months from his refusal. The ekrar also contained a provision that if, at the end of ten years, the one-fourth share of the profits should not cover the interest, defendants would pay the deficiency in cash:

HELD that the interest at 75 per cent. was not intended to be in the nature of a penalty, or any thing more than an estimate of damages for breach of contract.

HELD that in the absence of any confidential relation between the parties, of any imposition or misrepresentation, or any want of capacity, the Court could not say that the contract to give the ijara for the breach of which interest at 75 per cent. was to be paid, was of itself to be held invalid as being unreasonable and oppressive.

Parties who have had a suit determined upon questions which they thought fit to raise in the first Court are not entitled to make a different case in the Court of Appeal, though the Appellate Court may in some cases allow this to be done ... 352

(12) The removal of an obstruction by a Magistrate, in exercise of the powers given to them by Act VI. (B.C.) of 1868, sch. K., cl. 1, is not a judicial but an executive or ministerial act: and even the circumstance that a fine is imposed on the person who set up the obstruction does not protect the Magistrate, under Act XVIII. of 1850, from an action being brought to try the question of such person's right to have the obstruction there ... 391

(13) After a decree has been transferred under the provisions of Bengal Act III. of 1870, any application in relation to it, *e.g.*, to set it aside, should be made to the Court to which it has been transferred 448

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(14) Under Act VI. (B.C.) of 1862, s. 20, a suit under that Act and Act X. of 1859 can only be preferred in the revenue office of the sub-division in which the cause of action has arisen.

When a suit has not been preferred in the revenue office of the sub-division in which the cause of action arose, but in the revenue office of the district, and has been referred by the Collector to another Deputy Collector, the decree is not void for want of jurisdiction, but is voidable only at the instance of the defendant ... 450

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Where property to the immediate possession of which a —— is entitled, is conveyed away by parties having no right to it, the cause of action in a suit to recover possession is afforded to the ——, not to the reversionary heirs ... 444

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HOONDEE. Page.

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HOUSE ON JOINT LAND.

In a suit for the demolition of a house erected on land the joint property of plaintiff and defendant, although defendant had no right to erect it without his co-owner's consent, the Court ought to see whether the ends of justice cannot be satisfied by some other remedy ... 373

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INTERVENOR.

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INVALID LAKHERAJ.

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(1) Parties are not bound by an opinion of the Lower Court on a matter not in issue; and a case coming up to the High Court in appeal should be determined on the —— of the Court below, except where, under Act VIII. of 1859, s. 854, the Court considers it right to frame an additional issue ... 5

(2) A Judge is not bound to decide a question not raised in the plaint, and where a case comes before the High Court in special appeal, the parties must be held to the case made in the Courts below... 13

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(1) The right of members of a —— to participate in every portion of the joint property may be modified by the conduct of the parties ... 2

(2) The fact of a managing member of a —— paying the rents of the family property is not inconsistent with his uterine brother's rights; nor does his giving dakhilas indicate possession adverse to his brother's widow ... 2

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JOINT PROPERTY.

(1) Where on the execution of an *ex-parte* decree for money to be paid out of the estate of a deceased party, his son, being one of the defendants representing the estate, instead of objecting, asks for time to pay the amount due, HELD that the inference is that the property is not the self-acquired property of the son, but the joint property of the family ... 117

(2) Where the —— of an undivided joint family governed by the Mitakshara law is enjoyed in its entirety by the whole family, and not in shares by the members, no one member's interest can be taken charge of and separately managed under Act XL. of 1858 143

(3) Where a part of property sued for is admittedly joint, the presumption is that the residue is also joint, the onus lying on defendant to prove separate acquisition ... 343

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(1) An undivided shareholder may grant a lease of his share to a third person who, however, shall be prevented from dealing with the subject of the lease in any way different from that in which the lessor could deal with it ... 17

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(1) A man who has represented to an intending purchaser that he has not a security in the property to be sold, and induced him under that belief to buy, cannot, as against that purchaser, subsequently attempt to put his security in force ... 21

(2) Where a document which is not proved because of its great age, and of there being no witnesses to prove it, is put forward as a document intended to operate as a merasee tenure, it is necessary in order to establish its authenticity to show that it was accompanied by possession ... 22

(3) The question in this cause was the right of succession to Talook Sunkra which had been held by S, the common ancestor of plaintiff and defendant, and settled with him after resumption by Government.

Plaintiff's case was that S left two sons, M and plaintiff who was a minor; that M took possession, and in law held for himself and infant brother; that on M's death, his son D took his place as managing member of the joint family; and that on his death, leaving only a daughter (the defendant), plaintiff became entitled under the Mitakshara to the whole estate.

The defendant's case was that plaintiff was illegitimate, and that the estate descended from D to herself, an alternative defence being that, according to family-custom, the right of inheritance had been invested in the line of the eldest son.

The only issues settled were:—

1. Whether respondent (plaintiff) was the legitimate son of S?

2. Whether the law of primogeniture obtained in S's family?

Accepting (as the Privy Council did) the High Court's finding that plaintiff had established his legitimacy, the estate which was admitted to be ancestral, and presumed to be joint, would, in the absence of a special family-custom, descend to his two sons, leaving plaintiff entitled to one moiety at least. Whether he could be entitled to more would depend on the general law of succession to be applied. The Privy Council remanded the case for trial of the following issues:—

1. Whether S left any other legitimate sons than M and plaintiff; and if any are dead, whether they have left any male descendants?

2. Whether the estate of S which was formerly within Zillah Beerbhoom, having been transferred to Zillah Bhaugulpore, the succession thereby became regulated by the law of the Mitakshara; or whether, by reason of any local or family-custom, it continued to be governed by the Dayabhaga? ... 89

(4) Where a charge is made of want of *bona fides*, it lies upon the party making that charge to substantiate it by evidence satisfactory to those who have to decide the question.

In considering whether certain execution-proceedings were *bonâ fide* or not, their Lordships did not confine themselves to one particular attempt to revive execution, but felt bound to look at the whole course of the proceedings; and where they found that the first proceeding had been prosecuted with effect, and that, in a third attempt against which the judgment-debtor set up limitation, the decree-holder had successfully opposed him in two Courts, their Lordships thought there was strong evidence of a *bonâ-fide* desire to execute the decree.

Even, where a proceeding is ineffectual because of some mistake in the particular step advised, if it was taken to enforce the decree, it protects the decree-holder from the operation of the Statute of Limitations ... 97

(5) In an application by H, E, and B for a certificate under Act XXVII. of 1860, on proof of heirship to a deceased Mahomedan lady, it was admitted that H and E were the sons of the deceased, and, as such, claimed her property:

HELD that such an admission did not necessarily imply that H and E were, to all intents and purposes, brothers and heirs to each other, and that to give such an effect to the admission would be to carry the doctrine of heirship constituted by acknowledgment further than is warranted by the principles of the Mahomedan law ... 113

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(6) In a suit to establish plaintiff's right to a *toda giras hak* upon defendant's inam village, and to recover arrears due in respect of that *hak*, the substantial question was whether the suit being for the recovery of an "interest in immoveable property" fell within the 12th clause of the 1st section of Act XIV. of 1859, or was to be governed by the 16th clause:

HELD that the determination of the question depended upon the general construction to be given to the terms "immoveable property" and "interest in immoveable property" as used by the Indian Legislature; and that the term "immoveable property" comprehends all that would be real property according to English law, and possibly more:

HELD, further, that, whatever may have been the origin of the *hak*, it must be assumed to be now a right to receive an annual payment which has a legal foundation and of which the enjoyment is hereditary, and that the liability to make the payment is not personal, but attaches to the inamdar *virtute tenuræ*: HELD, accordingly, that the interest of the hakdar was an "interest in immoveable property" within the meaning of Act XIV. of 1859, and that the suit would be governed by the limitation of 12 years provided by cl. 12 of s. 1 ... 178

(7) Inasmuch as there may be a division of a joint and separate Hindoo family and of the joint property, such as to alter the *status* of the family, without a regular partition by metes and bounds, the question in every particular case of disputed division must be one of intention—whether the intention of the parties, to be inferred from the instruments which they have executed, and the acts they have done, was to effect such a division. 214

(8) Where the owner of an undivided share in a joint and undivided estate mortgages his undivided share, he cannot, by so doing, affect the interests of the other sharers, and the persons who take the security, *i.e.*, the mortgagees, take it subject to the right of those sharers to enforce a partition, and thereby convert what is an undivided share of the whole into a defined portion held in severalty.

Where such a partition is effected under the provisions of Regulation XIX. of 1814 before the mortgagees have completed their title by foreclosure and the consequential decree for possession, the mortgagees of the undivided share of one co-sharer, who has no privity of contract with the other co-sharers, would have no recourse against the lands allotted to such co-sharers; but must pursue their remedy against the lands allotted to the mortgagor, and, as against him, would have a charge on the whole of such lands ... 233

(9) The Port Canning Municipal Commissioners invited loans on debentures convertible into leasehold titles to lands in the town. The Port Canning Land Company subscribed to the loan declaring their desire to take land in lieu of the debentures. After the debentures were issued, a correspondence commenced between the parties with the object of effecting the conversion, in which correspondence the Commissioners intimated to the Company the construction they put upon the Company's tender, *viz.*, that they elected to take land to the full value of their debentures. The Commissioners also intimated to the Company that the latter had selected lots amounting to a part only of their debentures, and required them to select others, giving notice at the same time that they did not consider themselves liable to pay interest. The Company after this proposed to defer exchanging the debentures till their due date, and if the Commissioners consented not to call for the interest in the meantime, but agreeing to pay a quit-rent equivalent to the interest. The Commissioners agreed to this, and asked the Company to declare the lots which they would receive in commutation. A selection was made, but not in accordance with the contract; the lots selected being of more value than the debentures. The Commissioners then proposed that the Company should return the debentures, and pay quit-rent upon the additional lots. This was not

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accepted, but the matter was left in an imperfect state. The Port Canning Land Company subsequently brought an action against the Port Canning Municipality for two years' interest on the debentures:

HELD that the non-acceptance of the proposal as to additional lots could not affect the previous agreement to exchange debentures then held for equivalent lots; and that such previous agreement had been made involving quit-rent which extinguished the interest:

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(10) Act IX. of 1859, s. 20, which provided for suits brought in respect of property forfeited to the Government as the property of rebels, was intended to be of a general nature affecting claims to such property before whatever Court prosecuted, and not only claims prosecuted before the Commissioners established by the Act.

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(11) A decree having been obtained by a zemindar for arrears of rent of a putnee talook, it was held that, under the description "putnee" and "dur-putnee," the *primâ-facie* intention was that the tenure called a putnee tenure was transferable by sale, and was one upon which the right to sell for arrears of rent was reserved in the engagements interchanged upon the creation of the tenure. Consequently, according to the effect of Act X. of 1859, s. 105, and Reg. VIII. of 1819, ss. 8 and 11, and probably also of Reg. I. of 1820, the sale of the putnee destroyed all incumbrances created by the putneedar, *e.g.*, a dur-putnee 324

(12) In a suit for confirmation of their possession of certain mouzahs, plaintiffs, as heirs of a deceased lady, also prayed that it might be done after reversal of a summary proceeding, and after setting aside a fraudulent and fabricated deed of sale alleged to have been made by her in favor of defendant (her occasional man of business) while being alone and apart from her natural advisers. The first Court decreed the suit, confirming plaintiffs' possession, and setting aside the deed. The High Court holding that plaintiffs had no possession, reversed so much of the decree as confirmed plaintiffs in possession, and gave a declaratory decree concluding that they could not give substantive relief:

HELD that the High Court erred in that conclusion, for the prayer of the plaint that the deeds might be set aside was a prayer for substantial relief.

In a suit for setting aside deeds, some evidence ought to be given by the plaintiff in order to impeach the deeds he seeks to set aside. But in the case of sales or gifts made by a lady in such a position as that of a lady from whom defendant claims, the strongest and most satisfactory proof ought to be given by the person who claims that the transaction was a real and *bond-fide* one and fully understood by the lady ... 341

(13) HELD that Reg. XXV. of 1802 of the Madras Code did not either give to, or take away from, the former owners of lands not permanently assessed any rights which they then had. It merely vested in all zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them.

The object of Reg. XXXI. of 1802 of the Madras Code was merely the protection of the revenue from invalid lakheraj grants, and to provide for the mode of trying claims to hold lands exempt from payment of revenue. It was not intended to confer upon Government any title which did not then exist, or to assert that, according to the usages of th country, there was no private right to lands:

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(2) Where the accused was charged under s. 116, Penal Code, with having abetted the commission of an offence punishable under s. 161 of that Code, the person abetted having been a Civil Surgeon of a sudder station, it was held that the enhanced imprisonment prescribed by the latter part of s. 116 could not be awarded, as the Civil Surgeon was not a public servant within the words of the section "whose duty it is to prevent the commission of such offence" ... 9

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(2) Where such notice was given, and the ground of complaint to which such notice had reference was found by the Magistrate to be unfounded, it was held that the Magistrate could not proceed to adjudicate that an entirely different ground existed upon which it was likely that the party charged would commit a —— ... *ib.*
(3) A Bench of Magistrates, whether empowered under s. 224 or 225, cannot try a case of —— or any offence except those mentioned in ss. 222 and 225, Code of Criminal Procedure ... 12
(4) A Police report is, under Act X. of 1872, s. 530, explanation, sufficient information on which a Magistrate may take action in a case of apprehended —— under s. 491 of that Act ... 28

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See Evidence (1) (3) (5)

CONSPIRACY.
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CONVICTED PERSON.
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CRIMINAL INTIMIDATION.
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CRIMINAL MISAPPROPRIATION.
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CRIMINAL PROCEEDINGS.
There is no rule that a convicted person cannot institute —— ... 13

CROSS-EXAMINATION.
See Witness (2) (4)

CULPABLE HOMICIDE.
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D.

DACOITY.
See Jurisdiction (1)
See Procedure (6)

DISOBEDIENCE OF ORDER.
See Nuisance (2)

E.

ENQUIRY.
See Procedure (1)

ERROR.
See Jurisdiction (4)

EVIDENCE.
(1) The confession of a witness in the shape of a former deposition can be used as —— against a prisoner only on the condition prescribed by s. 249, Code of Criminal Procedure; that is, it must have been duly taken by the committing officer in the presence of the person against whom it is to be used. The certificate of the Magistrate appended to such confession, in order to afford *prima-facie* evidence under s. 80 of the Evidence Act of the circumstances mentioned in it relative to the taking of the statement, ought to give the facts necessary to render the deposition admissible under s. 249 ... 5

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EVIDENCE—*(Continued)*.

(2) Where the only —— for the prosecution was that of witnesses whom the Judicial Commissioner considered unworthy of belief, it was held that the prisoners, who were charged with rioting, ought not to have been convicted on the statements of the opposite party who were also charged with rioting, such statements not being —— against the accused in this case ... 48

(3) Statements made by one set of prisoners criminating another set of prisoners when each individual prisoner made a case for himself on which he was free from any criminal offence ought not to be taken into consideration under s. 30 of the Evidence Act against the prisoners of the second set when the two sets, although tried together, were tried upon totally different charges ... 53

(4) Before a Sessions Judge can, under s. 33, Act I. of 1872, admit the depositions of witnesses given in a former judicial proceeding as —— before him instead of and in place of the oral depositions of the witnesses themselves, it ought to appear that the presence of the witnesses could not be obtained without an amount of delay or expense which the Court considers unreasonable; and if there is nothing of a special nature to stand in the way, the case should be adjourned to the next sessions to procure the attendance of the witnesses ... 56

(5) Act I. of 1872, s. 30, which makes the confession of one prisoner —— against persons other than the man who made the confession, applies only to cases in which the confession is made by a prisoner tried at the same time with the accused person against whom the confession is used ... 65

(6) HELD, on a consideration of the Indian Evidence Act (I. of 1872), s. 114, that the Legislature intended to lay down as a maxim or rule of —— that the testimony of an accomplice is unworthy of credit, so far as it implicates an accused person, unless it is corroborated in material particulars in respect to that person; and it is the duty of a Court which has to deal with an accomplice's testimony to consider whether this maxim applies to exclude that testimony or not, and in a case tried by Jury, to draw the attention of the Jury to

Pa

EVIDENCE—*(Continued)*.

the principles relative to the reception of an accomplice's testimony ...

(7) A Judge should charge the Jury that the mere confessions of prisoners tried simultaneously with the accused for the same offence, which are, in a very qualified manner, made operative as —— by Act I. of 1872, s. 30, are only to be rated as —— of a defective character, and that they require especially careful scrutiny before they can be safely relied on ...

See High Court (3) (4)
See Local Enquiry (1)
See Oath (1)
See Sessions Judge (6)
See Witness (1) (2) (3)

F.

FALSE EVIDENCE.

See Full Bench Rulings (2)
See Sessions Judge (3)

FORGERY.

See Cheating.

FRAUDULENT TRANSFER OF PROPERTY.

The offence which s. 424 of the Penal Code contemplates is such a concealment or removal of property from the place where the property is deposited, as can be considered fraudulent, whether the fraud is intended to be practised on creditors or partners. Case in 15 W. R., Cr. 51, distinguished ... 10

FULL BENCH RULINGS.

(1) A partner who dishonestly misappropriates or converts to his own use, or dishonestly uses or disposes of any of the partnership-property which he is entrusted with or has dominion over is guilty of criminal misappropriation under s. 405 of the Penal Code ...

(2) Held by the majority (Jackson, J., dissenting) that a charge framed on the model given in Schedule III. of the Code of Criminal Procedure charging the accused upon two charges with having made contradictory statements in the course of judicial proceedings under s. 193, Penal Code, is a good charge, and that (Phear and Jackson, JJ., dissenting) the Court or Jury, if convicting, need not, by direct evidence, find which of the two statements is false; all that is

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LL BENCH RULINGS—*(Continued)*.

necessary being that the Court or Jury should find that the allegations made in the charge are proved ... 72

IRTHER EVIDENCE.
See Procedure (3)

G.

AMING ACT.
(1) The notification which the Government is empowered to issue under s. 2 of the —— II. (B.C.) of 1867, should specify the limits of any town to which it is intended the Act should apply, and must be published in three consecutive Gazettes ... 23
(2) Where a first notification which extended the Act to a town with specification of limits to which it was intended to be applied, was published only once, and a subsequent notification published three times extended the Act to the town without specifying the limits to which the Act was to apply, it was held that the subsequent notifications were not sufficient, but that that did not prevent the operation of the Act in places which were shown to be undoubtedly within the town according to its ordinary designation ... *ib.*

GAZETTE.
See Gaming Act.

H.

HAUT.
(1) The operation of s. 518, Code of Criminal Procedure, is confined to cases where, in the opinion of the Magistrate, the delay which would be caused by adopting a different procedure from that specified in the explanation to that section would "occasion a greater evil than that suffered by the person upon whom the order is made, or would defeat the intention of this (the 39th) Chapter" ... 26
(2) Where a Magistrate, without hearing the petitioner or giving him an opportunity of being heard, and simply upon the foundation of a police-officer's report, directed the petitioner to abstain from holding a —— upon his land on a certain day, because another party had long been accustomed to hold a——upon his land adjacent to the

Page.

HAUT—*(Continued)*.

petitioner's——on the day following that in which the petitioner held his ——, it was held that his order passed under s. 518 was *ultra vires*, the police-officer's report being vague and insufficient, and a private interest of this kind not affording a ground for making an order under s. 518, or any other order under the Criminal Procedure Code ... 26
See High Court (6)

HEAD CONSTABLE.
See Abetment (3)

HIGH COURT.
(1) In a case in which the accused was tried on charges of murder, culpable homicide, and causing grievous hurt, the Jury acquitted him of murder, but convicted him on the other counts. This verdict was recorded by the Sessions Judge, who then, in accordance with s. 263, Code of Criminal Procedure, questioned the Jury as to the grounds for their verdict, and the Jury eventually intimated their willingness to convict of murder. The Sessions Judge differed from the 1st verdict of the Jury; but as he had recorded the 1st verdict, he doubted whether he could accept the 2nd verdict, and referred the case to the —— under s. 263:

HELD that s. 263 did not apply to such a case as this. There could be no verdict delivered, and no verdict finally recorded until the last of the questions put by the Sessions Judge to the Jury was answered; and as it appeared from the answers of the Jury that their findings of facts disclosed that the verdict ought to have been one of guilty on the charge of murder, the Sessions Judge should have entered the verdict of the Jury as the verdict of guilty of murder. The case was accordingly returned to the Sessions Judge to enable him to do that and to pass such sentence as the law directed ... 1
(2) In a case referred under s. 263, Act X. of 1872, the —— declined to interfere with a verdict of a Jury from which the Sessions Judge disagreed, as the verdict was not clearly and patently wrong and unsustainable on the evidence 4

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HIGH COURT—*(Continued)*.

(3) The —— declined on appeal to receive evidence which was available at the trial below, when the prisoner deliberately elected not to give evidence in reply to the case made against him ... 13

(4) *Per Markby, J.*—It is not the duty of the —— in appeal to try a prisoner *de novo* upon the recorded depositions: the Court is bound, in forming its conclusions as to the credibility of the witnesses, to attach great weight to the opinion which the Judge who heard them has expressed upon that matter ... *ib.*

(5) HELD on a reference under s. 296, Act X. of 1872, that the —— has no power to set aside an order of acquittal even where a Deputy Magistrate acts illegally and acquits the prisoner improperly ... 21

(6) The powers of dealing with cases coming before the —— under ss. 294, 295, 296 are only such as are declared in s. 297, under which section the Court can only deal with errors in judicial proceedings. An order by a Magistrate, under s. 518, Code of Criminal Procedure, upon information and without any formal inquiry or taking of evidence, prohibiting a person from re-opening a haut, is not a judicial proceeding ... 22

(7) An order passed by an Assistant Magistrate in a case of breach of the peace, under s. 530 of the Code of Criminal Procedure, was referred to the——by the Sessions Judge with a recommendation that the order should be set aside on certain grounds stated, the want of jurisdiction in the Assistant Magistrate not being one of the grounds. The Division Bench, before whom that reference came, declined to interfere with the order. It was held by another Division Bench, before whom the matter was subsequently brought on motion, that they were not debarred from entering into the question of the want of jurisdiction; and as the effect of the Assistant Magistrate's order was to prejudice one of the parties, the order, which was admittedly without jurisdiction, was set aside. 32

(8) Under s. 280 of the Code of Criminal Procedure, the —— altered the conviction in this case from culpable homicide into one for murder, and enhanced the sentence accordingly ... 39

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HIGH COURT—*(Continued)*.

(9) The —— declined to interfere with a conviction by a Bench of Magistrates which appeared good, on the statement of the Magistrate that the case was one in which the Bench had no jurisdiction according to rules prepared by the Magistrate and approved of by the Local Government, which rules were not before the —— ... 45

(10) The —— declined, under Act X. of 1872, s. 70, to interfere with an order in a case under s. 530, in which the objection as to jurisdiction was not seriously taken in the Court below, and in which the petitioner failed in his application to the —— to show that he had been in any way prejudiced ... 88

(11) *Per Ainslie, J.*—The power given to the —— under ss. 294 and 297, Code of Criminal Procedure, of inquiring into the regularity of proceedings, and setting aside proceedings which are irregular, is a limited one, and is to be applied only in cases in which it appears that there had been a material error in such judicial proceedings; and in considering what a material error is, the Court is bound to be guided by the other parts of the Code, such as ss. 70, 283, and 297 ... *ib.*

See Bench of Magistrates.
See Jury (2)
See Municipal Commissioner.

I.

ILLEGALITY.
See Municipal Commissioner.

INVESTIGATION.
See Jurisdiction (2)

IRREGULARITY.
See High Court (11)
See Jurisdiction (2) (4)

J.

JOURNEY.
See Jurisdiction (3) (4)

JUDICIAL PROCEEDING.
See High Court (6)

JURISDICTION.

(1) A Magistrate has no —— to convict in a case in which the accused is charged, under s. 211 of the Penal Code, with having falsely instituted a criminal charge of the offence of dacoity ... 3

(2) Under s. 70 of the Code of Criminal Procedure, no sentence or order of a Criminal Court is liable to be set aside merely on the ground that the investigation, inquiry, or trial was held in a wrong district or sessions division, unless it is proved, or appears, that the accused person was actually prejudiced in his defence ... 46

(3) Where an offence of criminal intimidation under s. 503, Penal Code, was said to have been committed during a journey by railway from Bombay to Calcutta, it was held that the Magistrate of Howrah had no jurisdiction to entertain the charge, as the offence had not been committed within the actual territorial limits of his ordinary ——; and further, that the case did not fall within s. 67 of the Code of Criminal Procedure, that section (Illustration A) giving —— to the local tribunal at the place where the complainant or the offender first stops or breaks his journey; such journey must be a continuous journey from one terminus to another ... 66

(4) S. 70 of the Code of Criminal Procedure contemplates such an error only of —— as may arise from a case being tried in one district or sessions division of a province, where it ought properly to have been tried in the neighbouring district or sessions division; and does not apply to cases in which the right local —— is a —— foreign to the Court which has power to order a new trial, and which lies entirely outside the province to which the local division or district belongs in which the charge was actually entertained ... *ib.*

See Haut (2)
See High Court (7) (9) (10) (11)
See Procedure (3)

JURY.

(1) A Magistrate, acting under Act X. of 1872, s. 523, should exercise his own independent discretion in selecting the members of the ——, and the persons so selected by him should not be nominees of the party interested in upholding the Magistrate's order ... 43

(2) In this case the High Court, sitting as a Court of Revision under s. 297, Act X. of 1872, set aside the order of the Magistrate appointing to the —— persons who had been appointed by the opposite party, as it held that the error of procedure was a material one, inasmuch as the merits of the case had been thereby affected 43

(3) Where a——appointed by a Magistrate under s. 523, Code of Criminal Procedure, had fully entertained and considered the matter submitted to it, and the individual members of the —— had given in their opinion to the foreman to report to the Magistrate, and the only delay was in the foreman's making the report, it was held that the Magistrate could not appoint a second —— to consider the matter afresh, but ought to have acted on the report of the first —— which had been given in before he made his final order in the matter ... 54

(4) In a case in which a Magistrate ordered a person, either to remove an obstruction to a path leading to a road, or to show cause why such order should not be enforced, and in which subsequently the Magistrate, on the application of the party charged, appointed a —— under s. 523 of the Code of Criminal Procedure, it was held that the question, the ——should have been told to try, was the question whether the first order of the Magistrate was reasonable and proper, and for that purpose to consider whether there was a *bonâ-fide* question between the parties as to the right of way over this particular piece of land ... 64

See Evidence (7)
See High Court (1) (2)
See Previous Conviction (2)
See Sessions Judge (1)

L.

LAWFUL CUSTODY.

See Rescue.

LOCAL ENQUIRY.

When a ——, under s. 533 of the Code of Criminal Procedure, is instituted, it becomes part of the proceedings in the case, and the party affected by it is entitled to be acquainted with the results of it, and to have an opportunity of rebutting the deputed Magistrate's report if he thinks necessary so to do ... 25

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M.

MAGISTRATE.
See Jurisdiction (1)
See Jury (1) (2) (3)
See Mookhtear.

MISCHIEF.
In a case in which the accused was charged with having cut and carried away bamboos, the right to which was disputed, it was held that he could not be convicted of —— under s. 426 of the Penal Code ... 38

MOOKHTEAR.
A Magistrate has no power to suspend a —— under Act XX. of 1865... 41

MUNICIPAL COMMISSIONER.
The High Court declined to interfere, under s. 296, Act X. of 1872, with the order of a —— who was the editor of a newspaper, who had, prior to the disposal of the case, made very strong remarks on the case in the newspaper of which he was editor, holding that there was nothing illegal in his order though he would have exercised a wise discretion if he had refused to sit as one of the Commissioners in the case ... 31

MURDER.
See High Court (8)

N.

NOTICE.
See Breach of the Peace (1) (2)

NOTIFICATION.
See Gaming Act.

NUISANCE.
(1) An order by a Magistrate, under s. 521, Act X. of 1872, for the removal of a —— does not become absolute, until an opportunity is given to the persons affected by it to show cause why the order should not be carried into effect. 86
(2) No order can be made under s. 528 of the Code, unless there is imminent danger or fear of injury of a serious kind to the public involved in the case; and where a Magistrate, who had madean order under s. 521, subsequently directed further inquiry to be made, it was held that he must be considered to have abandoned his proceedings under s. 528, and that he should have proceeded under s. 525, instead of fining the party charged under s. 188 of the Penal Code ... *ib.*
See Obstruction (1)

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O.

OATH.
Under Act VI. of 1872, s. 5, the omission to take any ——, or any other irregularity in the form in which it is administered, does not invalidate the proceedings. ... 3

OBSTRUCTION.
(1) S. 526, Code of Criminal Procedure, does not enable a Magistrate to make any orders, except such as are mentioned in s. 521, under which he can only deal with an existing ——, the Magistrate has no power to direct what is to be done in the case of any future —— 18
(2) A Magistrate of the 2nd class having passed an order under s. 518, Act X. of 1872, for the removal of an ——, the Magistrate on appeal held that, though the proceedings of the Subordinate Magistrate were without jurisdiction, he (the Magistrate) was competent, under the s. 518, to direct the removal of the ——; and he passed an order accordingly:
HELD, that the order of the Magistrate under s. 518 was illegal, and that he should have proceeded under s. 521 and the following sections of the Code ... 24
See Jury (1) (4)
See Nuisance (1) (2)

OMISSION TO GIVE INFORMATION.
See Police Officer.

P.

PARTNER.
See Full Bench Rulings (1)

PATHWAY.
See Jury (4)

PENAL CODE.
See Act XLV. of 1860.

POLICE OFFICER.
HELD that, under Act V. of 1861, a —— is bound to communicate information to his superior officer regarding the commission of a riot affecting the public peace, and to make an entry thereof in the diary which he is required by s. 44 of that Act to keep, and that the omission to give such information brings him within the purview of s. 177 of the Penal Code ... 30
See Abetment (3)
See Breach of the Peace (4)
See Haut (2)

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POSSESSION.

Where a Magistrate found that an order of his predecessor made two years previously with regard to —•— of certain land had not been complied with, he enforced the order, and changed the —— in accordance with that order:

HELD that the Magistrate ought, under s. 491, Code of Criminal Procedure, to have maintained the —— which he found, even if it was inconsistent with his predecessor's order, and that he ought not to have taken any steps in the matter, unless some one actually in —— and guaranteed —— by that order, came to complain to him that his —— was threatened, or that he had just been forcibly turned out, and asked in pursuance of that order to be maintained in —— ... 2

See Breach of the Peace (5)

PREVIOUS CONVICTION.

(1) The fact of a —— should, under Act X. of 1872, s. 439, be stated in the charge, when it is intended to prove it for the purpose of enhancing punishment ... 40

(2) The question of proof of —•— is one of fact which ought to go to the Jury, and must be determined by a Jury ... *ib.*

See Attempt.

PROCEDURE.

(1) The previous inquiry, provided for by s. 146 before a complaint is taken up, ought not to be made after the accused has been brought before the Court under a warrant. 44

(2) In a case of several prisoners who were tried by a Sessions Court consisting of a Judge and Assessors, the latter convicted them, which finding was recorded by the Judge. The Judge, however, postponed giving judgment, and left the district without recording his finding or his judgment, and the Judge's successor, after considering the evidence which had been taken before his predecessor, convicted and passed sentence on the prisoners:

HELD that the conviction was not valid, and the trial had not been completed. The High Court accordingly set aside the conviction, and ordered the re-trial of the prisoners upon the charges upon which they were committed for trial ... 47

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PROCEDURE—*(Continued).*

(3) A valid conviction arrived at by a Magistrate who had jurisdiction in the matter cannot be set aside, simply because, subsequent to the trial and conviction, fresh evidence has been discovered which only tends to convict the accused of an offence other than that for which he was convicted ... 47

(4) It is not irregular in a warrant-case for a Deputy Magistrate to take the evidence of the complainant and certain witnesses on behalf of the prosecution in the absence of the accused. All that the accused has a right to expect after the charge has been framed is that the complainant and witnesses, who had been examined in his presence before the charge was framed, should be recalled for the purposes of cross-examination ... 61

(5) It is entirely within the discretion of a Magistrate conducting a trial in a warrant-case to admit evidence on behalf of either side at any stage of the trial, s. 192, Act X. of 1872, applying to such a case; but the Magistrate, in exercising the discretion conferred on him by this section, ought to have good reason for allowing witnesses on the part of the prosecution to be interposed in the midst of the case of the accused ... *ib.*

(6) In this case the charge was originally one of dacoity under s. 395, Penal Code, and the proceedings were first conducted under Chapter XVIII. of the Code of Criminal Procedure, but, during the progress of the case, the charge under s. 395 was lost sight of, and the accused were put on their defence on a charge of being members of an unlawful assembly under s. 143, Penal Code, and the proceedings were continued under Chapter XVII. of the Procedure Code in a summary way:

HELD that, had the complaint been one under s. 143, Penal Code, the Magistrate could, under s. 222, Code of Criminal Procedure, have tried it in a summary manner under Chapter XVII.; but, as the complaint was of a charge of dacoity under s. 395, the Magistrate had no jurisdiction to try the case in a summary manner, but should have inquired into it in a regular manner under Chapter

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PROCEDURE—*(Continued).*

XVIII., Code of Criminal Procedure ... 89
See Haut.
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PROSECUTOR.
See Criminal Proceedings.

PUBLIC SERVANT.
See Abetment (2)
See Nuisance (2)

PUNISHMENT.
See Abetment (2)
See Attempt.
See Previous Conviction (1)

R.

RECOGNIZANCE.
No order requiring personal —— to keep the peace can be passed under Act X. of 1872, s. 489, unless the accused has been convicted of rioting or any other offence ... 37

REFERENCE.
See High Court (1) (2)

RESCUE.
Before a conviction can be had under s. 225, Penal Code, it must be proved that the person, whom the accused are charged with having rescued, was in lawful custody at the time ... 22

S.

SESSIONS JUDGE.
(1) It is only when it is necessary, in order to ascertain what the verdict of a Jury really is, that a —— is justified, under s. 263, in putting questions to the Jury ... 1
(2) Under s. 472, Code of Criminal Procedure, before a —— can commit a person to the Court of Session, it is necessary that the offence should have been committed before the Sessions Court, and that it be one within the cognizance of, and triable exclusively by, that Court ... 37
(3) The offence of intentionally giving false evidence (s. 193, Penal Code), not being triable exclusively by the Sessions Court, is not one in which the —— can commit ... *ib.*

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SESSIONS JUDGE—*(Continued).*

(4) An order of commitment by a —— under s. 296 of the Code of Criminal Procedure is bad in form, if it does not specify the offence for which the parties are to be committed for trial to the Sessions ... 4
(5) A trial for the offence of cheating is not a Sessions case within the meaning of s. 296, having regard to the first portion of the definition of Sessions case in s. 4 of the Code, which must be read as if the word "only" followed the words "triable by a Court of Session" *ib.*
(6) In a case in which the accused was charged with murder, the —— considered the evidence given before him by the witnesses for the prosecution to be false, but nevertheless convicted the accused, acting under s. 249 of the Code of Criminal Procedure, and relying on the evidence which had been given by the same witnesses before the Committing Officer:
HELD that s. 249 did not apply to this case; that the discretion conferred by that section should be exercised upon substantial materials rightly before the Court, and reasonably sufficient to guide the judgment of the Court to the truth of the matter, and not upon mere speculation or conjecture; and that, under that section, a Judge may base his judgment on the evidence given before the Magistrate in the presence of the accused, when there are special and particular reasons for considering that evidence to be honest and true, and when that evidence is to a certain extent corroborated by independent testimony before himself ... 49
See Procedure (2)

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THEFT.
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See Procedure (6)

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VERDICT.
See High Court (1)

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W.

WARRANT.

See Procedure (1) (4) (5)

WHIPPING.

A sentence of —— cannot, with reference to Act VI. of 1864, s. 7, be passed on a conviction for theft under s. 379, Penal Code, as the former section only provides for sentences of imprisonment for a term not exceeding three years... 40

WITNESS.

(1) S. 327 of the new Code of Criminal Procedure, which permits the depositions of a —— to be taken in the absence of an accused person who has absconded, does not apply to a deposition taken before the new Code was passed ... 12

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WITNESS—*(Continued)*.

(2) Under s. 33 of the Evidence Act, depositions of an absent —— are only admissible when the prisoner has had the right and the opportunity to cross-examine ... 12

(3) Where s. 327 does apply, it should be shown that when the former deposition was taken, the accused had absconded, and after due pursuit could not be arrested ... *ib.*

(4) Under s. 218 of the Code of Criminal Procedure, a Magistrate is not competent to refuse to recall the ——es for the prosecution to be cross-examined by the accused, and it is not necessary for the accused to show that he has reasonable grounds for his application ... 29

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CIVIL RULINGS.

The 28th November 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt. Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Promissory Notes—Unstamped Documents—Evidence—Act XVIII. of 1869, ss. 3 & 18.

Case No. 1077 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 11th March 1873, affirming a decree of the Subordinate Judge of that District, dated the 2nd July 1872.

Ankur Chunder Roy Chowdhry (Plaintiff), *Appellant,*

versus

Madhub Chunder Ghose and another (Defendants), *Respondents.*

Mr. J. T. Woodroffe and *Baboos Chunder Madhub Ghose* and *Doorga Mohun Doss* for Appellant.

Baboos Romesh Chunder Mitter, Mohinee Mohun Roy and *Luckhee Churn Bose* for Respondents.

A suit upon a promissory note payable on demand, which was not stamped, was held to have been rightly dismissed; the note having been inadmissible as evidence with reference to Act XVIII. of 1869, section 3, clause 25:

HELD that in such a case the plaintiff, if he recovers at all, must do so on the contract actually made, and not on any implied contract.

Query.—Although there have been decisions in the English Courts upon the Stamp Act which support the contention that a defendant's written statement and deposition may contain such an admission as renders it unnecessary for the plaintiff to put the written contract in evidence, yet do not the words of section 18, Act XVIII. of 1869, prevent such a contention?

Couch, C.J.—THIS was an appeal from the decision of the Judge of Dacca, who had dismissed an appeal from a decision of the Subordinate Judge of that District, in which he held that the instrument upon which the plaintiff sued was a promissory note payable on demand and required a stamp, and that not being stamped it could not be admitted in evidence. The instrument was in these terms: "Rajah Narain Burdhun deposited with me Rs. 900 from your tuhveel. I will pay the same on demand with interest at the rate of one per cent. per month from this date to date of payment—the 13th Bhadro 1277."

The law applicable to it is Act XVIII. of 1869. In the 25th clause of section 3 of that Act it is said that "promissory note includes every instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight." This instrument clearly comes within these words, and the plaintiff cannot make use of that part of it which states the deposit of money, and say that from the deposit there arose a contract on the part of the defendant to repay it, because here the parties have made an express contract which has been put in writing. The plaintiff cannot resort to any implied contract; if he recovers at all, it must be on the contract actually made, and he must prove that, if it is denied. And he must do it by the production of the writing, which, not being stamped, cannot be used in evidence, and the suit must fail.

But it was contended before us that in the defendant's written statement and deposition there was such an admission of the contract as made it unnecessary for the plaintiff to put

the writing in evidence. Now, undoubtedly, there have been decisions in the English Courts under the Stamp Act which would support this contention; but it is doubtful whether the words of section 18 of Act XVIII. of 1869 are not so stringent as to prevent that. In that section there are words prohibiting not only the instrument being received in evidence, but its being acted upon in any Court. When it appears that the instrument is not stamped, although it may not be necessary to put it in evidence, these words may prevent a Court from giving any effect to it. But we thought it right to have the plaint and written statement and deposition of the defendant translated. The plaint states that the defendant received the Rs. 900 from the fund of the plaintiff through Rajah Narain Burdhun as "amanut," on condition of paying interest at the rate of one rupee per cent. per month, and refers to the fact of a writing having been given. The written statement denies that the money was drawn from the plaintiff's fund, and that it was received upon the condition stated in the plaint, and says that the "likhun" which was produced by the plaintiff does not contain a true statement; that the statement that Rajah Narain Burdhun deposited with him the amount covered by the "likhun" is false. In his deposition, or oral statement as it is called, the defendant says that he wrote the "amanutee roka" which was filed by the plaintiff, but that he did not receive the money covered by it.

The plaintiff filed the instrument with the plaint as that upon which he sued. I think that the written statement of the defendant does not amount to such an admission of the contents of this document as to dispense with its production in evidence. The plaintiff did not set it out, nor did the defendant admit it in such a way as to make it unnecessary for the plaintiff to produce it. It seems to me that when the plaintiff made it a part of his case that he should produce and prove the document, it cannot be said that his case was so admitted by the defendant that he need not produce it. Although it may, perhaps, appear a hard case, the plaintiff's suit must fail on account of the document not being stamped; still the law is so, and probably for a good reason. If the consequence of not stamping a document of this kind was not serious, the stamp laws would very frequently be disregarded. In this case, whether it is a hard one or not, the questions are whether the document required to be stamped, and was it necessary for the plaintiff to put it in evidence. I think it did, and that it was necessary.

The appeal must be dismissed with cost. The decision of both the lower Courts is right.

The 1st December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris

Judges.

Ameen's Report—Objections—Notice.

Case No. 205 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Patna, dated the 31st March 1873, affirming an order of the Moonsiff of Behar, dated the 13th September 1872.

Ram Narain Singh (Petitioner), *Appellant*,

versus

Goburdhun Lall Chowdhry (Opposite Party), *Respondent*.

Baboo Womesh Chunder Banerjee for Appellant.

Baboo Kalee Kishen Sen for Respondent.

An Ameen's report having been filed in a case, a day was fixed for hearing objections to the report, without notice being given to one of the parties. No objections having been filed on or before the appointed day, the Court passed its order in the case. The Lower Appellate Court made no investigation into the complaint of the absent party that he had had no opportunity of being heard.

The High Court set aside the order of the first Court, and remanded the case for re-hearing after reasonable notice.

Phear, J.—THE substance of the present appellant's complaint, both in the Lower Appellate Court and in this Court, is that he had no notice, and was not aware that this case was to be taken, heard, and determined by the Moonsiff on the 13th September. Unfortunately, neither the Moonsiff nor the Judge has afforded us any direct information upon this point. The Judge has occupied

nself at some length in a collateral quiry, as to whether or not the petitioner plied for a copy of the Ameen's report on e 13th September as he said he did. But do not find that any investigation was ade into the foundation of the complaint ich was made by the petitioner to the effect at the decision which was passed against n on the 13th September was passed with- his knowledge and without any opportu- y having been given to him of being heard. seems to be even doubtful on the face of judgment recorded by the Moonsiff whe- r the judgment-creditor himself was present the 13th September. The facts, so far as can ascertain them, seem to be that the meen's report was filed in the serishta on e 24th August, and four days after that te, namely, on the 28th August, the Moon- f passed an order by which the 13th ptember was fixed for the hearing of any jections to this report. When the 13th eptember came, according to the Moonsiff's dgment, the case was put before him, pos- bly only by the officers of the Court, and en, inasmuch as no objection had then been led, he made the order which is now com- lained of.

We further see that no day was originally xed for the return of the Ameen's report, nd that consequently there was no reason on hat ground why the petitioner should expect to be filed on the 24th or on any other day. We are not told how it came about that the Court passed its order on the 28th August. Of course, if both parties were at that time present, that fact would have been a complete nswer to the present appeal. But the re- pondent is quite unable to assure us, either by a reference to the matter on the record or n any other way, that the parties were, both f them, before the Court on the 24th August, r that the petitioner ever had, at any time, notice that the 13th September was fixed for the hearing of this matter before the Moonsiff.

Under these circumstances, it appears to us that the order of the Moonsiff was bad, and ought to be set aside. And accordingly we set aside that order, and remand this case to the Judge, with directions that he send it back to the Moonsiff in order that the Moon- siff may fix a day for the hearing, and give reasonable notice to both parties of the time which he may so fix.

Both the costs of this appeal and the costs which have been incurred in the Courts below must abide the event.

Pleader's fees in this Court are assessed at one gold mohur.

The 2nd December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Mesne-profits—Damages—Issues.

Case No. 180 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of Bhaugulpore, dated the 18th December 1872, modifying a decision of the Moonsiff of Mudhepore, dated the 17th September 1872.

Bhookun Singh and others (Plaintiffs), *Appellants,*

versus

Bohuree Singh and another (Defendants), *Respondents.*

Mr. M. L. Sandel for Appellants.

Moonshee Mahomed Yusuf for Respondents.

A claim to mesne-profits is a claim for such damages as will reasonably indemnify the claimant for loss occasioned in regard to rents and profits in consequence of wrongful dispossession, and as a foundation, therefore, for such claim, the question as to plaintiff's having been wrongfully kept out of possession by defendant must be first put in issue and determined.

Phear, J.—We are of opinion that in substance the decision of the Lower Appellate Court is right. This is a suit for mesne-profits, and we need hardly remark (because the matter has been often explained by this Court before) that mesne-profits or wassilat is only another term for damages which the plaintiff is entitled to, or alleges he is entitled to, as a consequence of his having been wrongfully deprived of the use and profits of land by the conduct of the persons against whom the suit is brought. It is competent to a plaintiff, who desires to recover mesne-profits, either to ask for them in the suit wherein he proposes to try the principal question as to the wrong, or to bring in the first instance a suit merely for the purpose of putting in issue, and determining the question whether or not the conduct of the person from whom he desires to get mesne-profits was wrongful in respect to keeping him out of the possession or enjoyment of the land. And then, in

the event of his succeeding in this the primary suit, he may, by virtue of section 10 of the Civil Procedure Code, bring another suit against the defendants of the first suit or their representatives in order to obtain from them the mesne-profits, that is, to get from them such damages as will reasonably indemnify him for the loss occasioned to him in regard to rents and profits by the wrongful conduct and ouster which had been established in the first suit.

In the present instance, it appears that the plaintiff had brought a suit limited to the recovery of land against certain defendants; and afterwards, having succeeded in the first suit, he brought the present suit for mesne-profits against the same persons defendants, joined with other persons, namely, one Bohuree Singh and others. At the time of the hearing of this suit, one Bajah Singh intervened and claimed to be made a defendant, and was in fact made a defendant by the Court. In this state of things, it is quite plain that the issues, which had to be tried between the plaintiff and the several defendants varied very greatly indeed, so much as in effect to constitute different actions; for, as between the plaintiff and those persons who had been defendants in the first suit, and against whom he had already obtained a decree giving him the possession of the land, the only question which was to be tried was the question to what extent each of them had, by his conduct, caused the plaintiff loss in the way of preventing him from having enjoyment of the profits of the land during the time that he had been kept out of it. But, as against the new parties defendants, there was a preliminary question of vital importance to be tried before any right to damages in the shape of mesne-profits could be even declared to have accrued to the plaintiff, namely, the question whether they had, at any time, kept him, or done anything to keep him, wrongfully out of the enjoyment of the land in respect of which the mesne-profits were sought. It seems to us in effect that there is thus before us at least two suits, two perfectly distinct suits, united in one. And, indeed, so far as this double suit is a claim to recover mesne-profits from parties altogether new, it is an attempt to make persons answerable for no wrong of their own, but for a wrong which had already been established against other persons entirely strangers to them. The Lower Appellate Court seems to have felt that this was the case; and on that ground to have thought it right to dismiss the suit against the appellant Bohuree Singh and Bajah Singh, that is, say, against the strangers. We do not desi to go so far as to say that under no circu stances could there be a combination of sai so to speak, of this peculiar kind, prope made and tried as one; although it is obvio that such a proceeding must necessarily, say the least of it, be always most inconv nient. But here certainly there seems to no reason whatever either why Bohur Singh should have been made a party to th suit by the plaintiff, or why the Court shou have made Bajah Singh a party upon his o intervention. As to Bajah Singh, it see to be perfectly clear that no decision passe in a suit for mesne-profits only, brought the plaintiff against other persons, could ha possibly affected him. The Court was wron when, in the exercise of its discretion unde section 73 of the Civil Procedure Code, placed Bajah Singh upon the record. An for that reason alone we are disposed to think that the decree which the first Court passe against Bajah Singh was a wrong decree. But it is clearly a wrong decree in another respect, namely, that it never was determine by the first Court, and no issue even wa raised to the effect, whether or not Baja Singh had wrongfully, for any period of time, kept the plaintiff out of possession of the land in respect of which mesne-profits were sought. The fifth issue which was raised in the first Court shows very distinctly that no issue of the kind just mentioned was ever contemplated, because it is couched in these terms: "Whether or not the objection that "Bajah Singh has a right can be allowed in "this suit without instituting a suit for "determination of right." It seems that there has not been, as regards Bajah Singh at any rate, a trial of the fundamental issue which was necessary in order that the plaintiff might have a foundation upon which he can claim mesne-profits at all.

The same remarks, excepting so far as regards the exercise of the discretion of the Court, applies to Bohuree Singh. The plaintiff ought not, in this instance, to have made Bohuree Singh a party defendant, and there has been no issue tried between the plaintiff and the defendant as to whether Bohuree Singh had wrongfully kept the plaintiff from the enjoyment of the property; and if so, during what period he had so kept him out. In truth, as regards both these sets of parties—parties who were strangers to the original suit—the first Court passed a decree for damages without any trial and adjudication as against them of such matter of wrong-

doing as would make them liable to pay damages. That decree was consequently an invalid decree, and the Lower Appellate Court was substantially right in reversing it. For these reasons we think that we ought not, in special appeal, to interfere with the decision which the Lower Appellate Court has passed. We therefore dismiss this appeal with costs.

But we think it right to add, if it is necessary to do so, that this decree is without prejudice to any right of suit which the plaintiff may be advised he has against Bajah Singh on the cause of action here sued upon, inasmuch as, in our opinion, Bajah Singh was wrongly made a party to this suit by the act of the Court itself.

The 2nd December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Rent-suit—Land for building purposes—Jurisdiction—Small Cause Court.

Reference to the High Court by the Judge of the Small Cause Court at Bhaugulpore, dated the 16th September 1873.

Gokul Chund Chatterjee, *Plaintiff,*

versus

Mosahroo Kandoo, *Defendant.*

A Small Cause Court has jurisdiction to entertain and determine a suit for the rent of land situated in a village in the interior of a district, and used partially for building purposes.

Case.—UNDER the provisions of section 22 of Act XI. of 1865, I have the honor to refer the above case for opinion to their Lordships the Hon'ble the Judges of the High Court.

The plaintiff sues to recover Rs. 5 from the defendant as rent for 8 cottahs of land, which he let to the defendant at a stipulated rent per annum to enable the latter to build a dwelling-house thereupon. This is an undefended case, the defendant not having appeared, although the summons is proved to have been duly served. The plaintiff, who has entered appearance, says that the defendant has built a few huts on a portion of the land, and on the remainder vegetables are grown which are sold by the defendant. The land in question is situated in a village in the interior of the district, and is not in a town. The point upon which I respectfully solicit the opinion of the Hon'ble High Court is one of jurisdiction. Is such a suit cognizable by the Small Cause Court or by the ordinary Civil Courts under the Rent Law?

The plaintiff contends that "a suit for rent of land used for building purposes is cognizable in the Court of Small Causes," and cites, in support of his statement, High Court ruling noted in the margin. Reading section 6 of Act XI. of 1865 with the ruling above quoted, I have some doubts as to the jurisdiction of the Court in cases of rent for lands situated in villages. The ruling quoted refers probably to rent for similar lands in towns.

Sutherland's Weekly Reporter, Volume XIX., page 308.

The judgment of the High Court was delivered as follows by—

Phear, J.—We are of opinion, on the statement of the facts presented to us by the Judge of the Small Cause Court, that the case substantially falls within the ruling of this Court which is reported in the 19 Weekly Reporter, page 308, and that the Small Cause Court has jurisdiction to entertain and determine the suit.

The 4th December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Landlord and Tenant—Onus Probandi.

Case No. 194 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 17th September 1872, reversing a decision of the Subordinate Judge of that District, dated the 11th May 1872.

Mohun Mahtoo (Defendant), *Appellant,*

versus

Meer Shumsool Hoda (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Bama Churn Banerjee* for Appellant.

Moonshee Mahomed Yusuf for Respondent.

As long as the relationship which arises out of a lease subsists, the lessee (tenant) is bound to pay to the lessor (landlord) the rents reserved therein. A tenant, denying a landlord's claim to rent on the allegation that the relationship has terminated, is bound to prove his allegation.

Phear, J.—WE are of opinion that the judgment of the Lower Appellate Court is

substantially correct and unimpeachable upon special appeal. It is quite clear that the defendant obtained possession of the property, which is the subject of suit, under a lease from the plaintiff; and, as long as the relation which arose out of that issue subsisted, the defendant was bound to pay to the plaintiff the rents reserved therein. The defence set up was that the plaintiff had terminated the relation which originated in this lease by taking *seer* possession of the property covered by it. If this were so, no doubt it would be a complete answer to the claim of the plaintiff for rents alleged to have accrued due after the period of time at which he had taken possession. The Judge is quite right, we think, in the view which he took, that the burden of proving that the relationship of landlord and tenant had come to an end in this way lay upon the defendant, who alleged that it had so come to an end.

The Lower Appellate Court has found upon the evidence that no such termination of the relation has been effected; the lease is still subsisting, and that, therefore, the defendant is bound to pay the rents to the plaintiff.

The Judge of the Lower Appellate Court makes the remark that possibly the defendant has abstained himself of late from collecting the rents from the ryots, and in that sense may possibly have given up the holding. But he cannot, by any act of his own, unless it is justified by the terms of his lease or by the conduct of his landlord, relieve himself from the obligation which the original contract has placed upon him. And that appears to have been the view of the matter taken by the Judge.

It has been urged before us in argument that at any rate the plaintiff had, during the period for which he is seeking these rents from the defendant, made some collections from the ryots. If that assertion were correct, no doubt the money which he so got would, inasmuch as it ought to have been paid by the ryots to the defendant, rightly be considered as money belonging to the defendant, and, in this suit, the defendant would have a right to ask that this money should be set off against the plaintiff's claim for rent. He has not made such a request in so many terms. But, if there was any ground for considering that the plaintiff had money of this sort belonging to the defendant in his hands, we think there would be no difficulty in giving the defendant the benefit of it in this suit. But, so far as we understand the judgment of the Lower Appellate Court, the Judge is clearly of opinion that the defendant has failed altogether to prove that the plaintiff has made any such collections from the ryots. Possibly the ryots have paid money into the Moonsiff's Court in the name of the plaintiff. If that be so, there is no reason pointed out why the defendant should not yet obtain the money. But he has no right of set-off against the plaintiff's claim in this suit unless he makes out that that money has actually come into the plaintiff's hand.

This appeal must be dismissed with costs.

The 4th December 1873.

Present:

The Hon'ble F. A. Glover, *Judge.*

Evidence Act, s. 73—Signatures.

Case No. 902 of 1873.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 30th January 1873, reversing a decision of the Moonsiff of Gurbetta, dated the 18th September 1872.

Tara Pershad Tangee (Defendant), *Appellant,*

versus

Lukhee Narain Paurai and others (Plaintiffs), *Respondents.*

Baboo Bungshee Dhur Sen for Appellant.

Baboo Bama Churn Banerjee for Respondents.

Where certain ryots swore that they got their pottahs from the hands of the person who professed to sign them, this was *held*, under the Evidence Act, section 73, as "proving, to the satisfaction of the Court," that the signatures were those of the lessor.

Glover, J.—THE question in this case is whether the plaintiff, who sued for arrears of rent at the rate of Rs. 23 a year, has

roved the kubooleut which he said the efendant had given him.

The Judge has found that he has proved t.

It is objected to this finding that the udge has considered the kubooleut proved, ecause he has first found that the defendant's ottahs are not proved, and that he has found hose pottahs not proved upon what is not eceivable evidence.

I do not think it is quite correct to say hat the Judge found the kubooleut proved, ecause the pottahs were not proved. He as found the kubooleut, as it seems to me, proved from the evidence of the subscribing witnesses, for he speaks of having weighed the evidence on each side. No doubt, he considered the question of the defendant's pottahs at the same time; and I think he did that out of a desire to see that the ryot-defendant had every chance given him to support his side of the case; and if the pottahs had been proved to be genuine, they would have been very strong evidence against the kubooleut, inasmuch as no man with these pottahs in his hands would have been at all likely to give a kubooleut for a large increase of rent.

Then, as to the objection that the Judge found against these pottahs upon what was not receivable evidence, the Judge says that, in order to test the validity of these pottahs, certain other ryots, who swear to having received pottahs from the same grantee, were called upon to give evidence, and to produce their documents that they did so, and, after having sworn that the pottahs they put in were the ones they got from the landlord, a comparison of the signatures was made between the two documents, and it was found that the signatures on the pottahs of these ryots were as different as possible from the signature in the pottahs put in by the defendants. These witnesses swear that they got their pottahs from the hands of the person who professed to sign them, and I think that this, under section 73 of the Evidence Act, might be taken as "proving, to the satisfaction of the Court," that the signatures on these documents were those of the lessor.

The special appeal must be dismissed with costs.

The 4th December 1873.

Present:

The Hon'ble F. A. Glover, *Judge.*

Remand—Re-trial—Evidence.

Cases Nos. 1194 and 1195 of 1873.

Special Appeals from a decision passed by the Additional Subordinate Judge of East Burdwan, dated the 11th March 1873, affirming a decision of the Moonsiff of Cutwa, dated the 31st December 1872.

Gudadhur Dutt and another (Defendants), *Appellants,*

versus

Shushee Monee Dossia (Plaintiff), *Respondent.*

Baboo Umbika Churn Banerjee for Appellants.

Baboo Mohendro Loll Mitter for Respondent.

Where a suit was remanded by the Lower Appellate Court for a "re-trial," the intention of the order of remand was held to be that the whole case was to be gone into *de novo*, the plaintiff being allowed to prove her case in any way she could.

Glover, J.—These were suits for rent for the years 1278 and 1279. The plaintiff claimed at the rate of 28 rupees and 14 annas; the defendants admitting the tenancy alleged that the rent was only 27 rupees 11 annas.

The Moonsiff, in the first instance, found that the plaintiff had not proved the rate of rent claimed by her, and that the defendants had on their part shown that 27 rupees 11 annas was the correct rent; he therefore dismissed the suit.

The Judge, on appeal, remanded the case for a new trial, making certain observations as to the difficult position of the plaintiff, who was a new proprietor of the estate by purchase, and finding fault somewhat with the Court below for not having allowed her certain indulgences in the way of summoning witnesses, and procuring the documents by which it was supposed that she could have substantiated her claim. The Judge remarks in his order of remand that it was a proper case for a re-trial, and that this was to be held, after giving plaintiff full opportunity, to call for the ex-proprietor's zemindaree-papers and any witnesses whom the conduct of Banee Madhub Ghose had made it necessary to hear.

The Moonsiff thereupon re-heard the case, and decided it in favour of the plaintiff, and the Judge, on the second appeal, has come to the same finding.

It is contended here in the first place that the Judge had no right to make a remand-order at all; that, under section 354 of the Code of Civil Procedure, if he thought that there was anything wanting in the Moonsiff's judgment, or that any evidence had not been taken which it was necessary to take, he should have kept the case on his own file, and directed the lower Court to take such evidence as was necessary, and return its finding on that evidence to him.

It seems doubtful whether section 102 of the Rent Act would not apply to this case, inasmuch as it was a suit for rent less than Rs. 100, in which no issue of right or title, or the right to enhance rent, was involved. But supposing it not to apply, and an appeal from the order of remand passed by the Judge to be allowable, I think that this Court's decision would have to be governed by section 350 of the Procedure Code, inasmuch as the Judge's order, taking it to be an order of remand, does not, in any way, affect the merits of the case or the jurisdiction of the Court. Supposing the order of remand to be a correct one, or rather supposing that no objection could be taken to it at this stage, did the Moonsiff, when the case was remanded to him, act up to the remand-order? It is said he did not, and that, instead of confining himself to calling upon the ex-proprietors to produce their papers, and summoning the other witnesses whom the plaintiff wanted to have summoned, he decided upon other documents which the plaintiff herself produced to which it was not proved that the defendant had attached his signature. It is urged that the Judge gave no order to the Moonsiff to accept those papers, or, in fact, to take any other evidence than that which he himself had pointed out in his order. But, as I have said before, the Judge's words are that there was to be a "re-trial," and I understand by this that the whole case was to be gone into *de novo*, and that the plaintiff was to be allowed to prove her case in any way she could. I do not understand that the Judge's order was ever intended to shut out the evidence now offered by the plaintiff, the less so, as she was, as the Judge says, in a particularly difficult position, not knowing exactly what to bring forward as evidence. It was for the Moonsiff, as it was for the Judge, afterwards on appeal, to decide whether the papers filed by the plaintiff on the remand were genuine or not; but I see no reason why they should be shut out simply on the wording of the Judge's decision. On the contrary, I consider that the wording of the order covered the admission not only of these papers, but also of any others which the plaintiff might have thought proper to produce.

Both appeals must be dismissed with costs.

The 5th December 1873.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Wrongful Dispossession—Liability—Damages—Remedies.

Case No. 168 of 1873.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 9th September 1872, reversing a decision of the Moonsiff of Shazadpore, dated the 16th May 1872.

Nudiar Chand Shaha (Plaintiff), *Appellant,*

versus

Prannath Shaha and others (Defendants), *Respondents.*

Baboo Tarinee Kant Bhuttacharjee for Appellant.

Mr. J. H. Rochfort and *Baboo Sreenath Doss* for Respondents.

A party, who wrongfully takes possession of another's boats, and places them in such a position that, without any neglect on the part of the owner, they become unserviceable until the ensuing rainy season, is responsible for the consequences of his own act, and is not in any way discharged, because the police makes over the boats to the owner at a time when there is no water in the river, and the boats cannot be moved.

A plaintiff is entitled to ask for any remedy which the Court may think proper upon the state of facts disclosed in his plaint, and established by the evidence; and a mistake in asking for a particular remedy will not debar him from some other remedy similar in its nature and not more extensive, provided it requires no change in the facts.

Ainslie, J.—THE plaintiff in this suit seeks to recover possession of two boats from the defendant No. 1, together with damages for the detention of the same, on the allegation that the said defendant colluding with the plaintiff's servant, Sook Chunder Manjee, took possession of the boats, and moved them from Shahzadpore Ghât, where they had been placed by the plaintiff, to Churuck Pahee Ghât, a place within his own estate; and that, in consequence of the drying-up of the Dourah, it was impossible to remove the boats back into the river until the following rainy season. The first Court directed the defendant to make over the boats in question to the plaintiff, or, in default of his doing so, to pay the sum of Rs. 250 as the value thereof, and also to give Rs. 400 damages as compensation for all losses sustained by the plaintiff.

Both parties appear to have appealed to the District Judge. The Judge laid down three issues, but only tried two. The first issue is whether the defendant No. 1, the only party with whom we have to deal here, is responsible for any loss that may have accrued to the plaintiff between the 16th of Pous 1277 and the 16th of Pous 1278 for the non-use of the boats by the plaintiff. The Judge was of opinion that the appellant is not strictly liable for any loss for the non-use of the boats after the date of the order passed by the Deputy Magistrate on the 17th of January 1871, and he found that, in accordance with that order, the plaintiff received the boats into his own custody in Magh 1277, corresponding with January 1871.

Then the next issue was whether the boats were in the possession of the defendant, and if he justly liable for the decree for the restoration of them to the plaintiff, or to pay Rs. 250 in default thereof.

He says that the boats were not in the possession of the defendant; that there is no evidence of any opposition on the part of the defendant to the removal of the boats by the plaintiff; and that, therefore, there can be no decree directing the defendant to make over the boats to the plaintiff. The third issue, which was as to the measure of damages, appears to have been raised by both parties, but it was not decided.

In special appeal it is urged that the order of the Magistrate, releasing the boats from attachment, did not absolve the defendant from the duty of restoring them to the plaintiff. It was said that the withdrawal of the attachment was nothing; that there must be a distinct act of the defendant by which he surrendered the custody of the boats to the plaintiff.

It appears from the order of the Magistrate that the police was directed to give up the boats into the custody of the plaintiff himself, and there is evidence that they were so delivered. It is not shown that, at any time when the plaintiff attempted to remove the boats, the defendant made any opposition whatever. Under these circumstances, it is quite clear that the order for the restoration of the boats or payment of their value in default of such restoration is bad, inasmuch as the boats are and have been, during the whole of this litigation, under the control of the plaintiff himself, if he chose to exercise it.

The second point is that the Judge is entirely wrong in saying that the plaintiff was bound to go to the expense of dragging the boats from the dry land into the water, and that, in default of doing that, he has no right to claim damages for the detention of the boats in a place where they were not capable of being used. We think that it is quite clear that, if it is established that the defendant wrongfully took possession of the plaintiff's boats, and placed them in such a position that, without any neglect on the part of the plaintiff, they became unserviceable until the filling-up of the river in the rainy season, he must be responsible for the consequences of his own act, and that he is not in any way discharged, because the police made over the boats to the plaintiff in January, when there was no water, and when the boats could not be moved.

Assuming, then, that the defendant wrongfully seized the boats in Jeit 1277, and that the plaintiff was in no way to blame for their detention till the end of the rains of that season (and it has not been suggested that he was to blame in any way for the attachment by the Magistrate), we think it quite clear that the plaintiff is entitled to recover damages for the detention of his boats up to Jeit 1278. The pleader for the special appellant admits that there was no claim in the Court below for damages prior to the 16th of Pous 1277, consequently, if the Lower Appellate Court comes to determine the amount of damages to be awarded to the plaintiff, it will take the period for which they will be calculated from the 16th of Pous 1277 to the end of Jeit 1278.

The third point raised in special appeal does not need to be considered. Before the Judge can come to any conclusion at all as to the right of the plaintiff to recover damages, he

must find as a fact whether or not the defendant was guilty of certain wrongful acts, and whether the detention of the boats was distinctly the result of these wrongful acts. The first Court, no doubt, has found as a fact that this was so, and it has been suggested that the second Court has concurred in that judgment; but we think that we should be going too far to say that the Judge deliberately found as a fact that there were wrongful acts. His words are: "The plaintiff, in my "opinion, should then have taken away the "boats, and he might afterwards have brought "a suit for damages incurred by the wrongful "acts of the defendant which caused the "detention of his boats up to that date," &c. In the mode in which the Judge has dealt with this case, it was not directly necessary to determine whether the acts of defendant were wrongful, and what he says of wrongful acts in the above-quoted passage is rather by way of suggestion as to the form of plaint that might have been adopted than a finding of fact.

Under these circumstances we think that the case should go down to the Judge in order that he may distinctly find whether there was a wrongful act by the defendant by which the boats were removed from the custody of the plaintiff, and whether that wrongful act was the cause of the boats being detained up to the end of the rainy season in the second year. If he finds this as a fact, he will consider what is the proper amount of damages to be awarded.

It has been said by the pleader for the respondent that the plaintiff, having framed his suit for a remedy in a particular form, ought to be restricted to that remedy. Speaking for myself, I think it a good rule to hold a plaintiff strictly to his plaint; but a plaintiff is entitled to ask the Court to give him any remedy which the Court may think proper upon the state of facts disclosed by him in his plaint, and established by the evidence; and, although he may have been mistaken in asking for a particular remedy, that will not debar him from obtaining some other remedy similar in its nature, and not more extensive than what was originally sought, provided it requires no change in the facts as originally alleged. In this suit the facts remain unchanged, though the legal effect of those facts is not what the plaintiff attributed to them.

The costs of this appeal and the costs in the Court below will follow the ultimate result.

The 5th December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Execution-proceedings—Appeal—Jurisdiction.

Case No. 224 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Purneah, dated the 16th April 1873, reversing a decision of the Moonsiff of that District, dated the 13th August 1872.

Mirza Sayefoollah Khan and another (Decree-holders), *Appellants,*

versus

Tirthanund Thakoor (Objector), *Respondent.*

Moonshee Abdool Baree for Appellants.

Baboos Tarucknath Sen and *Tarucknath Dutt* for Respondent.

A person, who was no party to the suit, having objected to an attachment made in the execution-proceedings, and his objection having been overruled, made an application, as if by way of appeal, to the Judge, who reversed the decision of the Moonsiff:

HELD that the order of the Judge was made without jurisdiction.

Phear, J.—THIS matter has come up to us by way of appeal, but the basis of the objection to the Judge's order is that it was made without jurisdiction; and that appears very clearly to be the case. The so-called respondent before us is admittedly no party to the suit; he has not been made a party, and indeed there was no reason why he should have been made a party, to the execution-proceedings in the present suit. He objected to the attachment which had been made of certain property in the course of these execution-proceedings, he himself at that time being an entire stranger to the suit. The decision of the Court, which was charged with the carrying-out of the execution-proceedings, was against him, and his objection to the attachment of this property was overruled. That being so, his remedy was by a separate action if he had need for a remedy at all. Instead, however, of bringing an independent suit, he, in some unexplained way, got the Judge to entertain an application from him as if by way of appeal from the decision of the Moonsiff; and, on the hearing of this application, the Judge reversed the decision of the Moonsiff. It seems to us very plain that there was nothing rightly before the Judge upon which he could exercise his

dicial authority and discretion. The view ich the Judge has taken of the merits of at application may or may not be correct. it is correct, it seems to be to this effect, at the attachment of which the objector mplained was in truth as irregular as any tachment could well be, and such that it ust necessarily be ineffectual to support a le; and in that event, it is clear again at the objector had not even cause of mplaint. If the judgment-debtor had ppealed against the decision of the Moonsiff, e matter would have been very different. he judgment-debtor might possibly have ry good ground indeed to complain of an regular attachment, or of proceedings being ken by way of attachment which would ly lead to vexation and harassment of him bout any fruition to the judgment-creditor. owever, the judgment-debtor did not take is course. The result was, as it seems to , that there was nothing before the Judge n which he could reverse the order of the loonsiff. Accordingly, we think that we ght to quash the order of the Judge as ing bad for want of jurisdiction. The ppellant must have his costs in this Court id in the Lower Appellate Court. We allow he gold mohur for pleader's fees in this ourt.

The 5th December 1873.

Present :

he Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act VIII. (B. C.) of 1869, s. 52—Ejectment.

Case No. 245 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 28th May 1873, reversing an order of the Sudder Moonsiff of that District, dated the 23rd November 1872.

Baboo Gokhlanund (Decree-holder), *Appellant,*

versus

Lalljee Sahoo (Judgment-debtor), *Respondent.*

Moonshee Mahomed Yusuf for Appellant.

Baboos Nil Madhub Sen and *Kalee Kishen Sen* for Respondent.

A party who is under an obligation by the terms of a ree not only to pay arrears of rent, but also to give possession, is allowed by Act VIII. (B. C.) of 1869, section 52, relief from the operation of the latter portion of the decree if he pays the money decreed within fifteen days of the date of the decree.

Phear, J.—THERE appears to have been some slight misapprehension in the mind of the Lower Appellate Court in reference to this matter. The date of a decree of Court is without doubt the day when the judgment of the Court is passed, that is, when the decretal decision is pronounced by the Court in the presence of the parties, or if not in their presence, at least publicly on an occasion when they have had the opportunity of being present. If there could have been any question with regard to this point, it would seem to be entirely set at rest by the words of the Legislature in section 189 of the Civil Procedure Code.

Now, in the case before us, the plaintiff obtained a decree against the defendant. That decree gave him a double remedy: It awarded him a certain sum of money in respect of arrears of rent, and it also declared that the defendant's lease was cancelled. And this decree was pronounced in the presence of the defendant's pleader on the 12th August 1872. These facts are beyond dispute. They are stated by the Moonsiff in his judgment, and not questioned by the Judge. Now this being so, the defendant was under an obligation by the terms of the decree, not only to pay the money decreed to be paid to the plaintiff, but also to give up possession of the property to the plaintiff. But then the Legislature, by the provisions of section 52, Act VIII. of 1869 (B.C.), gives a defendant who is under a double obligation of this kind a certain amount of relief; for that section declares that, if he pays the amount of money decreed within fifteen days from the date of the decree, then he shall be relieved from the operation of the other portion of the decree. In this case, then, the defendant might have avoided the cancelment of his lease, which was directed by the decree, if he had paid the money decreed to be paid within fifteen days from the 12th August, that is to say, at any time on or before the 27th August. He did not attempt to pay, as we understand the facts, until the 19th September. Consequently, he has not done anything to entitle himself to the relief which is afforded by section 52 of the Rent Law. He is still under the obligation imposed by the decree both to pay the money, and to give up possession of the property. It seems to be very unintelligible why the Moonsiff refused to receive the money when it was tendered by

the defendant. We therefore reverse the decision of the Lower Appellate Court with costs, and the decision of the Moonsiff, so far as it goes, must stand.

One gold mohur is allowed for pleader's fees in this Court.

The 8th December 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Alternative Titles.

Case No. 287 of 1873.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 27th September 1872, reversing a decision of the Additional Moonsiff of Arrah, dated the 22nd April 1872.

Woodit Singh and another (Plaintiffs), *Appellants,*

versus

Buldeo Singh and another (Defendants), *Respondents.*

Mr. M. L. Sandel for Appellants.

Baboos Kalee Kishen Sen and *Grish Chunder Ghose* for Respondents.

Where the title upon which a plaintiff sues is put forward in the alternative, and the two parts of the alternative are not inconsistent with each other, he ought to obtain a decree if he makes out either branch of his alternatives.

Phear, J.—In this suit the plaintiff alleged that he was entitled to possession of a certain small piece of land, 4 beeghas 5 cottahs, by hereditary gomashta right; or in the alternative, by the right of having occupied for a period exceeding 12 years. He complained that he had been wrongfully turned out of this land as the result of the Deputy Collector's order, and he asked to recover possession after determination of right.

The cause of action manifestly is the wrongful turning out. And inasmuch as the title upon which the plaintiff sues has been put forward by the plaintiff in the alternative, an alternative that is by no means inconsistent one part with the other, he ought to succeed in obtaining a decree for possession if he makes out either branch of his alternatives.

The Judge of the Lower Appellate Court formed the opinion that, under the term "gomashta," the plaintiff was claiming a ri to hold the land at fixed rates of rent. A inasmuch as he came to the conclusion the evidence that the plaintiff had failed establish these fixed rates of rent, dismissed the suit. But the Lower Appell Court abstained from finding, or appears have abstained from finding, whether plaintiff had made out the right to occupat if not at fixed rates, at rates liable to varied. For these reasons, it seems to that the judgment of the Lower Appell Court is defective. It is not perfectly cl on the face of the plaint whether the plai iff asked for a further remedy beyond recovery of possession. It is possible t he claimed to have a determination of rates of rent at which he was entitled hold. But, even if that be so, the failure prove his right to a portion of the reme for which he asked did not disentitle him the remainder of the remedy. If, therefo the Lower Appellate Court is of opini that, although the plaintiff has failed to ma out the right to possession at any speci fixed rates of rent, yet he has made out right to possession of the land at rates wh may be varied, it ought to give him a dec for possession merely. We therefore reve the decision of the Lower Appellate Co and remand the case to that Court for re-tri Costs will abide the event.

The 8th December 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Ancestral Property—Alienations—Acquiescen

Case No. 289 of 1873.

Special Appeal from a decision passed the Judge of Sarun, dated the 30 September 1872, reversing a decision the Officiating Subordinate Judge of th District, dated the 18th July 1871.

Ram Kishore Narain Singh (Plaintiff), *Appellant,*

versus

Anund Misser (Defendant), *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Moonshee Mahomed Yusuf for Respondent.

In a suit to avoid alienations effected by plaintiff's father at a time when plaintiff was living in commensality with his father as a member of a joint family,

hich suit was brought after 12 or 13 years had been owed to go by without any objection, save the filing a petition of protest in a Court of justice, whereof the ndees were not made aware:

HELD that plaintiff was rightly considered to have sented to the alienations.

Phear, J.—WE think we ought not, on ecial appeal, to interfere with the decision the Lower Appellate Court. It seems to us, on the facts which have been found by that urt, and which have been, in substance, mitted in argument before us, that no terial error has been committed by the wer Appellate Court in regard to the con-usion at which it has arrived. The present intiff was of age at the time the alienations re effected by his father—the alienations hich he seeks to avoid; he was living in mmensality with his father, and enjoying the operty as a member of the joint family; must have been aware of the alienations hich were made by his father; and there n hardly be the least doubt that he partici-ted in the benefits which the money tained by these alienations brought to the mily. There seems to be no evidence hatever to the contrary. He allowed some or 13 years, or even more, to go by without aking the smallest objection to his father's aling with the property, unless the filing of petition of protest in some Court of justice an be called an action of this sort. We are ot informed, and we hardly know how it ould be the case, that any one of the vendees r mortgagees were made acquainted with his protest, or that they were, in any anner, warned by the plaintiff not to take ny property in his father's hands. And it eems to us that the Lower Appellate Court id no injustice to the plaintiff by holding that, fter lying by so long as he has done, under ll the circumstances of the case, he must be aken to have consented to the alienations, hich he has brought this suit for the pur-ose of setting aside. He does not offer to ecoup the defendants any portion of the oney which they paid for the property so any years ago. And, on the whole, we are f opinion that this special appeal has failed. Accordingly we dismiss the appeal with osts.

The 8th December 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Transfer of mortgaged property—Redemption-suit—Limitation—Issues.

Case No. 251 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Patna, dated the 26th November 1872, reversing a decision of the Moonsiff of Behar, dated the 6th January 1872.

Jeechoo Sahoo (Plaintiff), *Appellant,*

versus

Syud Museeoollah and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Boodh Sen Singh for Respondents.

A redemption-suit against the representatives of a mortgagee is not barred under the Statute of Limitations by reason of being brought beyond 12 years from the date on which the mortgaged property had been wrongfully sold away by the mortgagee.

In a redemption-suit against the auction-purchaser from a mortgagee it is necessary to determine whether defendant obtained the land under such circumstances that he is bound by the mortgage-bond.

Phear, J.—THE Judge says: "In my "opinion the suit is barred by the Statute of "Limitation, as pleaded on the part of the "defendant. The fact of the defendant's "auction-purchase on the 3rd March 1857 "is not denied, and is further evidenced by "the certificate of sale bearing date 22nd "April 1857. His possession, it is true, was "previously that of a mortgagee, but, from "the date of auction-purchase, it became "adverse to the plaintiff, and the suit, not "being instituted within 12 years from that "date, is barred."

It appears to us that there has been a misapplication of the Statute of Limitation in this case. If it be assumed that the Judge intended to find as a fact that, up to 22nd April 1857, the defendant's possession was that of a mortgagee, then it is quite clear that the defendant could not, by wrongful conduct at that period, prevent the plaintiff from having the benefit of the long period of limitation which the Legislature thought fit

to give to a mortgagor. In truth, the Limitation Act, when pleaded, obliges the defendant to assume that the plaintiff's case is substantially true, and then, upon that assumption, for the purposes of the defence under that plea, to content himself with the allegation that, although true, the cause of action accrued so long before the date of the institution of the suit, that the Statute of Limitation prevents him from applying to a Court of law for the remedy. So that, in this case, if the Statute of Limitation could be made of any service to the defendant at all, it must be upon the assumption that the plaintiff has the equity of redemption which he says he has, and would, had it not been for lapse of time, have been entitled to assert it.

The case seems to be simple enough in its facts. The real question between the plaintiff and the defendant appears to be this: Whether or not the 8-annas share of Ameergunge passed to Deep Chand and others by virtue of the auction-sale in November 1853, and subsequently from them to the plaintiff, as he says it did. Because, if that were the case, then, inasmuch as the defendant admits that Ameergunge did belong to Ameerooddeen, and indeed makes out his own title to it through a purchase of Ameerooddeen's rights and interests in it, which he says he made in March 1857, it is quite clear that the plaintiff's title is prior and superior to that set up by the defendant. If Ameerooddeen had parted with Ameergunge, or his equity of redemption in respect to Ameergunge, to Deep Chand in 1853, he could have nothing to sell to the defendant in 1857. On the other hand, if the plaintiff's claim to represent the mortgagor Ameerooddeen is established, then there is nothing in the law of limitation to prevent him from maintaining this suit for redemption against the mortgagee or the representative of the mortgagee. But another question would even then arise in this suit, namely, whether the defendant is liable to account for this land as mortgagee of the plaintiff, *i.e.*, did he obtain the land under such circumstances that he is bound by Ameerooddeen's mortgage-bond; for, if he is not so bound, then the plaintiff's suit, which is a redemption-suit against a mortgagee, fails altogether, and the suit cannot be treated merely as an ejectment-suit, because plaintiff cannot recover the land from a stranger without establishing his right to possession as against his mortgagee. We understand from the judgment which has been read to us that the Lower Appellate Court has not tried the facts which are essential to these questions, and according we think it necessary that the case sho go back for re-trial. The decision of t Lower Appellate Court is accordingly r versed, and the case remanded for re-trial. Costs will abide the event.

The 9th December 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Decree for Foreclosure—Execution-sale—Objections—Act VIII. of 1859, s. 246—Rights Judgment-debtor.

Case No. 741 of 1872.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 22nd February 1872, affirming a decree of the Subordinate Judge of that District, dated the 6th September 1871.

Shaikh Eida (one of the Defendants), *Appellant,*

versus

Ramjug Pandey and others (Plaintiffs), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Baboos Romesh Chunder Mitter and *Mohini Mohun Roy* for Respondents.

A mortgagee brought a suit to enforce his mortgage-lien, and obtained a decree which ordered a sale of the mortgaged premises. On petitioning for the sale, two objectors came forward, E and P, claiming under conveyances which had been made by the judgment-debtor *pendente lite*. The Moonsiff upon this ordered the sale of the rights and interests of the judgment-debtors:

HELD that, as the judgment-debtors had parted with their rights and interests, the sale was abortive and inoperative, and the Moonsiff's order inapplicable to the case; and that the decree-holder had a right to have the property sold which had been originally pledged to him:

HELD that E and P could have taken the property in no other way than as subject to the rights of the parties to the suit, and that the Moonsiff should have treated them as being, on their own showing, none other than the judgment-debtors themselves.

Order passed on the first hearing on 31st March 1873:—

Phear, J.—IN this case it appears that the present plaintiff had a mortgage-bond, covering certain property which is now the subject of the present suit, granted to him

y the lessors of Gopal Sahoo and Gridhari ahoo, and he brought a suit against them o enforce his mortgage lien; in this suit he btained a decree on the 30th April 1866, eclaring his lien, and ordering a sale of the nortgaged premises. On the 16th June 868, he petitioned for a sale of this property ccording to the decree. Upon this, two ets of objectors came in, who were respect-ely represented by Eida and Purmeshur. heir objections were entertained and dis-osed of by proceedings held under section 46 of the Civil Procedure Code. The loonsiff before whom the matter came pheld Eida's objection to the extent of annas 2 pie, being one moiety of the whole annas 4 pie originally mortgaged, and ade an order to that effect on the 24th December 1868. He found more difficulty n determining the right course to take with egard to Purmeshur's objection. Ultimately, owever, he appears, in some sense, to have verruled it, and came to the conclusion that he rights and interests of the judgment-ebtors should be sold, and he made an order (to which I shall probably have to refer gain) bearing upon this point on the 28th December 1868. The next day, 29th December, a sale was had, and the judgment-creditor, the original mortgagee himself, bought what was then sold. He now brings the present uit upon the footing of the purchase which he thus made against the original judgment-debtors, seeking to recover that which he had purchased, and which he alleges was the 4 annas 4 pie share of the mouzah.

In this suit Eida and Purmeshur were permitted to intervene. He has succeeded below in getting a decree against all the defendants for the full amount, namely, 4 annas 4 pie.

I will now go back a little in time in order to get at the origin of Eida's and Purmeshur's claim.

It seems that, after the present plaintiff had obtained the decree in April 1866, which ordered the sale of the mortgaged property, *i.e.*, the decree made on the 18th April 1868, Eida obtained a bond from the judgment-debtors, who mortgaged to him the same property, the whole 4 annas 4 pie, to secure the mortgage-debt. It will be perceived that this was before the present plaintiff had preferred his petition for sale, for that was on the 16th June 1868. It further appears that, on the 30th June 1868, the judgment-debtors conveyed 2 annas 2 pie o Purmeshur. In this state of things, laintiff's petition for sale still pending, the present defendant Eida, on the 21st July 1868, brought a suit upon his bond of April, and in September of the same year obtained a decree against Gopal Sahoo and Gridhari Sahoo (the present plaintiff's judgment-debtors) declaring his lien and ordering a sale of the mortgaged property. He appears to have applied for a sale accordingly. Some third persons then intervened, alleging that they had previously purchased 2 annas 2 pie, and, in consequence of this objection, that share or moiety was released. And Eida, on the 11th December 1868, upon the sale thus obtained by himself, bought the remaining 2 annas 2 pie. It was upon the footing of his decree of September 1868, and eventually of his purchase of December 1868, that Eida intervened upon the present plaintiff's petition for sale, and succeeded, as I have already said, in inducing the Moonsiff to exclude his 2 annas 2 pie from the property to be sold.

Purmeshur also intervened upon the footing of his conveyance of the 30th June 1868. And it was the complication introduced, as I understand, by these different proceedings, which so effectually puzzled the Moonsiff that he found himself reduced to the necessity of making the order of the 28th December 1868—an order which has been interpreted to us as simply an order for the sale of the rights and interests of the judment-debtors.

With this explanation, I think we are able to say what it was that really did happen at the sale of the 29th December.

The present plaintiff had petitioned to have the property sold which was previously decreed to be sold. But the Moonsiff had made an order on the 24th December that the 2 annas 2 pie claimed by Eida should not be sold. And it seems to me that the result of the order of the 28th December 1868 was that, as regards the rest of the property, only the right, title, and interest of the judgment-debtors should be sold. The sale of the 29th December followed immediately on these orders—in fact, was the effect of those orders. Now the rights and interests of the judgment-debtors in the property at that date were, on the facts which I have stated, absolutely *nil*. They had parted with 2 annas 2 pie to Eida, as the result of the decree of September 1868, and the sale which followed thereon in December 1868; and they had parted with another 2 annas 2 pie to Purmeshur, as the result of the conveyance of the 30th June 1868. And if that be so, of course there was nothing

which could pass to the present plaintiff by virtue of the Moonsiff's sale of the 29th December, if he merely sold, as he seems to have done, the then existing rights and interests of the judgment-debtors. But the truth is that that order for sale of the Moonsiff was inapplicable to the present case. The present plaintiff had a right to have the property sold which had been originally pledged to him, and which had been decreed to be sold by the Court's decretal order of the 30th April 1866. It was no proper order for sale upon that decree which directed the rights and interests of the judgment-debtors to be sold as they stood on the 28th December 1868. It seems to me that the order of the Moonsiff and the sale had by him, on the day following, did not affect the sale of the property or any portion of the property which was decreed to be sold by the decretal order of April 1866.

I will not stay to inquire whether it was a right course in a case like this to entertain objections, and to deal with them precisely under the words of section 246 of the Civil Procedure Code. But, supposing it were so, it seems to me clear that either the bond of April 1868 to Eida, or the conveyance of June 1868 to Purmeshur, could not, as against the decree of the 30th April 1866, create a new ownership in, so to speak, third persons. At the time when Eida and Purmeshur took under those conveyances, the subject which they took was already a matter of suit, and a decree had been passed which directed it to be sold, and they could take it in no other way than as subject to the rights of the parties in that suit. If the Moonsiff made any real inquiry at all upon the objections of these intervenors, he ought at once to have been satisfied that the title which they put forward did not serve to distinguish them from the judgment-debtors; they had by their own account taken the property which was the subject of suit *pendente lite*, and they could not stand in a better position with regard to it than the vendor from whom they took, and against whom a decree had, at that time, already been made in respect to this very property. The Moonsiff ought, even under the strict provisions of section 246 of the Civil Procedure Code, to have treated the objectors as being, on their own showing, none other than the judgment-debtors themselves. Therefore it appears to me clear that the proceedings of the Moonsiff upon the matter of objection put forward by Eida and Purmeshur altogether miscarried, and had the effect of bringing about an abortive sale. In this view, we are bound to dismiss the plaintiff's suit, because he has got no title to claim these lands under that pretended sale. But of course we ought not to limit our decree to this simple form. The plaintiff's interests must at the same time be protected (for we are able to do this, inasmuch as all the persons concerned in the matter are parties to the present suit): his interests must be protected by a declaration that the sale was an abortive inoperative sale, and that the plaintiff is entitled to a refund of any money which he has paid as consideration for the purchase. It seems, however, that we are not in a position to make this latter declaration at the present moment, because, I understand, the judgment-debtors are not here before us in the Appellate Court.

Under these circumstances, we think that we must withhold our final decree, until notice has been given to the judgment-debtors to appear here.

Probably the best course will be to adjourn the matter for a month in order that notice may be given to the judgment-debtors to appear in this appeal.

I have expressed the views which we at present hold as to the form which the decree ought to take in order to do complete justice between the parties. But if the parties will come to some agreement such as that which was suggested during the hearing by the Court, the decree may be made still more complete, namely, it may by consent be decreed that the sale be set aside, and that a new sale of the property decreed to be sold be directed; and further, either that the money which has been paid into Court should be refunded to the plaintiff, or that it should remain there, and be taken as the first bid on the part of the plaintiff in the new sale. Of course, all this can be done only by an agreement between the parties. For the present we will adjourn the matter for a month, and give notice to the judgment-debtors in order that they may appear at the expiration of that period with information as to that which has now been suggested.

Judgment passed on the final hearing:

Phear, J.—As we are informed that the summonses have been duly served upon the judgment-debtors, and they have not thought it right to appear, and no objection is made to the order which this Court at the last hearing proposed to make as the final order in the case, that order will therefore now be made. We dismiss the plaintiff's suit; but we add the declaration as against

e judgment-debtors that, inasmuch as e sale was a void and inoperative sale, e plaintiff is entitled to a refund of any oney which he has paid as consideration r the purchase. If the payment has been ade in the shape of a set-off, that set-off ust be removed.

The defendant, other than the judgment-ebtors, will have his costs.

The 9th December 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Lease by Joint Shareholder—Rights of Co-proprietors.

Case No. 57 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 4th February 1873.

L. N. Macdonald (one of the Defendants), *Appellant,*

versus

Lalla Shib Dyal Singh Paurey and others (Plaintiffs), and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Romesh Chunder Mitter* for Appellant.

Baboos Unnoda Pershad Banerjee, Chunder Madhub Ghose, and *Judoonath Sahoy* for Respondents.

An undivided shareholder is not prevented by law from granting a lease of his share to a third person. All that the other co-proprietor can insist upon is, that the lessee should be prevented from dealing with the subject of the lease in any way different from that in which the lessor, his co-proprietor, could deal with it.

A joint shareholder or any lessee of a joint shareholder is at liberty to contract with the ryots of the zemindaree for any lawful purpose, even without the consent of the other co-proprietors.

Phear, J.—It appears to us that the Subordinate Judge has misapprehended the law applicable to this case, and that his judgment therefore cannot be supported.

The plaint is very unfortunate in its wording; and we regret to find that the Subordinate Judge, according to his own record, directed it to be admitted and registered as a suit after having perused it, for we think that it was the duty of the Judge, to whom this plaint was presented for the purpose of being filed, to refuse to receive it in its present state. It is indefinite and contradictory; and we may say that it is with considerable hesitation and doubt that we at last arrived at the conclusion that it contains enough in it to support a suit. The substantial allegations which the plaintiffs make, as we understand their plaint, are as follow: That they are 12-annas shareholders of a certain Mouzah Sonotepore, and that the defendants Nos. 2, 3, and 4 are the remaining 4-annas shareholders. Further that these latter shareholders have executed a pottah of their share to the defendant No. 1. The pottah is dated the 28th January 1871; and that, under cover of this pottah, the defendant No. 1 has wrongfully taken exclusive possession of certain lands described and set out in the schedule to the plaint belonging jointly to the 16-annas shareholders. Upon this alleged state of facts, the plaintiff asks that the pottah granted by the defendants Nos. 2, 3, and 4 to the defendant No. 1 should be cancelled, and the defendant No. 1 should be turned out of the exclusive possession of the land which is the subject of suit, and prohibited for the future from sowing indigo upon that land.

If the facts, which we thus suppose to constitute the alleged foundation of this suit, are in substance made out, then, no doubt, the plaintiffs have the right to ask that the defendant No. 1 be turned out of exclusive possession, and also that he be prohibited for the future from doing anything on the land which is the subject of suit which a co-sharer of the plaintiffs has no right to do. But it is a mistake on the part of the plaintiffs to ask as a matter of right that the lease should be cancelled, because there is certainly nothing in the law of Bengal which goes to prevent an undivided shareholder from granting a lease of his share to a third person. All that the other co-proprietor can insist upon is that the lessee should be prevented from dealing with the subject of the lease in any way different from that in which the lessor, his co-proprietor, could deal with it.

The Subordinate Judge takes it that the joint proprietorship of the 2nd, 3rd, and 4th defendants with the plaintiff is admitted; that the lease alleged to have been granted by them to the defendant No. 1 is also admitted; and, further, the defendant No. 1 has admitted that he has procured the ryots to sow indigo upon the land which is the subject of suit; and the Subordinate Judge, upon these facts, which he supposes to be admitted, is of opinion that the plaintiff is entitled to a decree not only to the extent of the injunction which he asked for, but also to a decree which will cancel the lease

and eject the defendant No. 1 from the land which is set out as the subject of suit.

It has already been said that the facts set out in the plaint do not entitle the plaintiffs to a cancelment of the lease, much less the facts upon which the Subordinate Judge has relied. The first issue which was raised in the lower Court was in these words: "When "both parties admit the lands of 16 annas "of Mouzah Sonotepore to be held jointly by "the maliks, had the maliks of the 4-annas "share authority to permit defendant No. 1 "to cultivate, or get cultivated by ryots, "indigo on any quantity of the joint lands "of the mouzah?"

And this issue, the Subordinate Judge says, must, upon the authority of a decision of this Court, be answered in the negative. We think that the Subordinate Judge is entirely in error in this respect. There is nothing in law to prevent any one from inducing ryots by contracting with them, or by other fair means, such as offering rewards, to cultivate any crop they like upon the lands which they are holding, provided that they are holding those lands without any covenant or stipulation in their agreement with their zemindar to cultivate them in a particular way. Two decisions of this Court have been referred to by the Subordinate Judge, and we think have been misinterpreted by him. The decision which is reported in the 16 Weekly Reporter, page 41, merely lays down that one shareholder, joint with another, cannot interfere with the ownership of that other without his consent, whether he interferes by taking khas exclusive possession of the land which belongs to both shareholders jointly, or interferes by disturbing the occupation of joint ryots against the will of those ryots. It has been, as far as we are aware, nowhere laid down by this Court that a joint shareholder, or any lessee of a joint shareholder, cannot contract with the ryots of the zemindaree for any lawful purpose, even without the consent of the other co-proprietors. In this view it appears to us that the decision of the lower Court, which has been come to upon the footing of the defendant's written statement alone, is erroneous in law, and must be reversed.

Then comes the question whether the plaintiff has in his plaint exhibited a cause of action which ought to be sent back to the first Court for trial. And, after some hesitation, as has already been mentioned, we think that there is such a cause of action. In the 4th clause of the plaint, the plaintiff says: "The No. 1 defendant, having perpe- "trated various acts of tyranny and oppres- "sion on the tenants of 16 annas, took "criminal proceedings against them, and had "several of them sent to jail, some of whom "died in prison, and a number of them "deserted the village, and the defendant No. 1 "brought 131 beeghas 5 biswas of the "land of 16 annas of the aforesaid mouzah "under indigo cultivation."

The last line alone of this clause involves a statement of material fact, namely, the statement that "the defendant No. 1 has "brought 131 beeghas 5 biswas of the "land of 16 annas," *i.e.*, of the joint shareholders, "of the aforesaid mouzah under "indigo cultivation." If this stood alone, it would be doubtful whether the plaintiff meant to say that he, defendant No. 1, had, in any wrongful mode, brought the land under cultivation or not; it might be that he brought it under cultivation simply by inducing the ryots, occupants, and cultivators of the land to cultivate indigo in preference to any other crop. But, coupling this clause with the schedule which is appended to the plaint, and is verified as part of the plaint, and seeing that the heading of that schedule is "Statement of land under indigo cultiva- "tion of defendant No. 1, and definition of "boundaries with the names of the tenants, "whose holding the different plots were," we think these two passages together amount to an allegation that the defendant No. 1 had taken the land specified in the schedule into his exclusive possession, and cultivated it with indigo after wrongfully turning the ryots out of it. It possibly is going some way in favour of the plaintiff to put this construction upon his words, but still, on the whole, considering that the case has not yet been tried or decided upon the facts, we think that we ought to give the plaintiff an opportunity of making this assertion good, inasmuch as it certainly does appear to be, without distortion of his words, an allegation made by him in his plaint. If that allegation can be made out in fact, it will, as has been before observed, afford a foundation upon which the plaintiff will be entitled, not to have the lease which is complained of cancelled, but to have an order equivalent to an ejectment of the defendant from the exclusive possession of this land, and an injunction restraining the defendant for the future from doing any act which is inconsistent with the joint proprietorship of the plaintiff.

On the whole, we think that there is

enough in the plaint, read with the schedule, to raise this issue, and accordingly, while we reverse the decision of the lower Court, we remand the case to that Court for re-trial upon the question whether or not the defendant No. 1 has wrongfully taken exclusive possession of the land which is set out in the schedule or any portion of it, and maintained that exclusive possession without the consent of the plaintiff.

Costs must abide the event.

The 10th December 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Benamee Purchase—Onus Probandi—Old Documents—Parol Evidence.

Case No. 299 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 20th August 1872, reversing a decree of the Moonsiff of Durbhangah, dated the 29th April 1872.

Mussamut Fureedoonnissa and another (Defendants), *Appellants,*

versus

Ram Onogra Singh (Plaintiff), *Respondent.*

Mr. Twidale and *Moonshee Mahomed Yusuf* for Appellants.

Baboo Taruck Nath Palit for Respondent.

To make out a title to property, it is not sufficient that the party from whom, or in whose name, the claimant alleges that he bought the property, does not come forward to dispute the allegation. It is necessary for the plaintiff to establish, either the alleged benamee, or a subsequent conveyance from the alleged benameedar.

Even where a deed or other document is so old that it is not reasonable to expect proof of the *factum* of its execution, its authenticity must be made out in some reasonable way, the usual method being parol testimony as to the facts of its custody.

Phear, J.—This is in fact a partition suit. It is a suit brought to have a declaration of right to a share in ijmali property, in order that a butwarra may follow upon that declaration. It is therefore incumbent upon the Court, in the first place, to inquire whether the plaintiff has any share, and, if so, what share, in the specified property. In the event of the Court coming to the conclusion that the plaintiff has no share at all in the property, then the suit ought to be dismissed. But, if the Court comes to the conclusion that the plaintiff has some definite share in the property, whether precisely that share which he alleged or not, then it ought to proceed to ascertain the shares of the other parties to the suit.

The objection which was made on special appeal is that the Court below has been wrong in finding that the plaintiff has made out a title to any share at all in the property. It is not necessary for us at this time to go into the evidence, or to inquire much into the details of the case. It is sufficient to remark that the plaintiff claimed to have 2 annas 1 gunda share in certain property. He made out his title to it in this way. He stated that he had bought 18 gundas of it from one Burkut Ali at an execution-sale, which was held so long ago as the 17th January 1827; that he bought another 1-anna share as the consequence of a certain pre-emption-decree given in his favour, this 1-anna share being the share belonging to one Furhut Ali; and that this purchase took place on the 24th February 1830. Finally, he said that he bought another 1-anna share by private sale from Rahmut Ali and Khoda Buksh on 10th Sawun 1241.

He then added that, out of this total of 2 annas and 18 gundas, he sold 17 gundas; so that there remained to him now, at the time of the claim, 2 annas and 1 gunda.

It does not seem to have been seriously disputed by any one at the trial that the shares of the property which, the plaintiff said, he bought on these three different occasions belonged to their respective alleged vendors, but plaintiff's purchase from these vendors was questioned in each instance. And one of the principal objections made to his title was that these purchases, all three of them, appear to have been made in the name of one Mohun Lall Doobey, and that the plaintiff had not proved his title, either by convey-

ance from Mohun Lall Doobey, or by identification of himself with Mohun Lall Doobey. With regard to this objection, the Judge says: "In the first place I must note that the "plaintiff did not purchase in his own name, "but in that of Mohun Lall Doobey. To this "the heirs of the latter do not object, and "no one else has a right to."

There the Judge leaves the matter, abstaining altogether from deciding the question whether Mohun Lall Doobey was only another name for the plaintiff, or whether the plaintiff was entitled in any other way to the benefit of Mohun Lall Doobey's purchase. In this we think that the Judge was wrong. It is not sufficient to make out a title to property that the person from whom the party alleges that he bought the property, or in whose name he alleges he bought the property, does not come forward to dispute the allegation. Mohun Lall Doobey's heirs are not parties to this suit, and they have not been made witnesses in the case. It was essential to the success of the plaintiff, when he had established these three different purchases in the name of Mohun Lall Doobey, to show as against the defendants that Mohun Lall Doobey was only another name for himself, or to show that he had obtained a title by subsequent conveyance from Mohun Lall Doobey. The case of the plaintiff seems to be that Mohun Lall Doobey was merely benamee for himself; but against that there certainly is a very strong evidence indeed on the record, namely, a decree passed by a competent Court between the present plaintiff and the heirs of Mohun Lall Doobey in 1861; a decree which, as it has been read to us, seems to have the effect of dismissing a claim made by the present plaintiff to have a declaration of right to these properties against the heirs of Mohun Lall Doobey.

However this may be, we think that the Judge was wrong in not weighing all the evidence bearing upon this point, and coming to a distinct finding with regard to it. We may also add that the Judge, although he has touched upon the question as to the plaintiff's possession, has not found in distinct terms how the plaintiff has been in possession. He says: "I find that the plaintiff's wit-"nesses have proved his possession, assisted "by kubooleut from several ticcadars which, "though old papers and unattested, assist "plaintiff in establishing his claim." It is a little difficult to satisfy one's self as to what this passage really was intended by the Judge to convey; possibly it only amounts to saying that, in the opinion of the Jud the plaintiff's possession at the time of suit was made out. Still the Judge d refer to old papers as if he was speaking o possession which had extended over so time. If this were so, it is unfortunate t he has not made his language express up the point. From the language of the Jud it would seem that the old papers up which he placed some reliance were properly made evidence in the case. says: "Which, though old papers and unatte "ed, assist plaintiff in establishing his claim From this we suppose that these old pape had not been proved by evidence. No although a deed or other document may be old that it is not reasonable to expect that t person who relies upon it should be able prove the *factum* of its execution, yet authenticity must be made out in some reaso able way before the Court is justified using it as evidence against an opposi party. The usual mode of proving t authenticity of an old document is to gi parol testimony as to the fact of its custod so far back as the person in whose hand is can account for it.

In the present case, if the suit of t plaintiff is well founded, he must have bee in possession of some share of the proper in suit for a very long period—indee as regards 18 gundas, for a period upwards of five and forty years, and wit regard to the other parcels, for very near as long a period. Now, if this be so, t facts of possession ought to be capable o being proved; and the custody of these ol documents for that period, or something like that period, would be very cogen evidence indeed of their authenticity. An this very long period of possession would b almost conclusive on the question whethe or not Mohun Lall Doobey was anothe name for the plaintiff in the matter of thes purchases. It would be almost impossible to resist the conclusion that, if a purchas made five-and-forty years ago in the name of Mohun Lall Doobey was followed in-stantly by possession in the person of the plaintiff, and that possession had been conti-nued down to the present time, together with the possession of muniments of title on these facts Mohun Lall Doobey was only a benamee name for the plaintiff in these purchases.

We think that the decision of the Lowe Appellate Court must be reversed, and the case remanded to that Court for re-trial.

Costs will abide the event.

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The 5th November 1873.

Present:

Sir James W. Colvile, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Mortgaged Property—False Representation.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Munnoo Lall

versus

Lalla Choonee Lall and others.

A man, who has represented to an intending purchaser that he has not a security in the property to be sold, and induced him under that belief to buy, cannot, as against that purchaser, subsequently attempt to put his security in force.

THIS appeal has been heard *ex parte*, and after considering the opening of Mr. Leith, which has been made in a fair and candid manner, it appears that there are concurrent findings of two Courts below upon a question of fact decisive of the case, and decisive of it against the appellant.

The circumstances are very short. It appears that a man of the name of Reep Bhunjun Singh was in debt, and at the time possessed some considerable estates. The appellant Munnoo Lall had been his banker, and advanced money to him, and, amongst other securities, he held a mortgage of the date of 9th October 1863 from Reep Bhunjun Singh of Mouzah Shahpore. It was an ordinary mortgage to secure the sum of Rs. 20,000. Subsequently to that mortgage, on the 9th of August 1864, Reep Bhunjun Singh sold the mouzah to the respondents, or to those whom the respondents represent, the bulk of the consideration given for the purchases being the money which was due to the purchasers from Reep Bhunjun Singh, for which they had obtained decrees. Besides the amount of the decrees, a small sum was paid on each of the purchases in cash. Four years after these purchases, the appellant commenced this suit, which is a suit to enforce payment of his mortgage-bond against the respondents, and prayed a sale of the mouzah. The defence set up by the answer, amongst others, was the equitable defence that Munnoo Lall could not enforce his mortgage-bond as against these respondents, because, at the time of their purchase, he had been present when the negotiations for the purchase took place, and in answer to inquiries had led the purchasers to believe that he had not any lien upon the estate; consequently that he had not the mortgage-bond which he sets up in this suit. The defence is made in the answer, as Mr. Leith observed, in not very precise terms, but they say that the purchase was made in consultation with the plaintiff and his son, and at that consultation they were led to believe that there was no such lien as the mortgage of 1863.

The issues were settled, and two only of them are material. The first was that the bond was altogether collusive and made without consideration for the purpose of defeating any subsequent purchasers; and the second, which has become the material one, is: "Was its existence"—that is the existence of the mortgage-deed—"intentionally "kept secret from the defendants at the "time of the purchase?" There was a third issue, which raised the question whether the litigated property being under attachment at the time of the execution, the mortgage-deed was thereby rendered nugatory. Upon the first trial of these issues, the Judge of Shahabad, having found the third issue against the plaintiff, was of opinion that it decided the cause, and that it was immaterial for him to determine the other issues. However, on appeal to the High Court, that Court reversed the judgment of the Judge of Shahabad, and remanded the case for trial upon the first two issues to which attention has been called, and amended the second issue by inserting the words "by the plaintiff" after the words "was its existence intentionally kept secret." The parties went down to try that issue, which was in effect whether the plaintiff had intentionally and designedly, and with a view to deceive the defendants, kept the existence of his mortgage secret from them. That issue raises a pure question of fact. It appears that there was evidence on both sides, the witnesses on behalf of the respondents giving testimony that the negotiations took place in the presence of the appellant Munnoo Lall; that inquiries were made whether he had any mortgages, it being expected from his relation to the vendor that he might have them; and that, in answer to those inquiries, he distinctly stated that he had none, and documentary evidence was also

* From the judgment of Peacock, C.J., and L. S. Jackson and Macpherson, JJ., in Letters Patent Appeal No. 6 of 1868, decided 6th December 1869.

given in support of the affirmative of the issue. Some evidence undoubtedly was given on the other side of a contrary character. The Judge of Shahabad, who heard the witnesses, has given credit to those who were called on the part of the defendants. He distinctly gives credit to them, and he thinks that their evidence is corroborated, not only by the documents, but by the probabilities of the case. On appeal to the High Court, the High Court affirmed his finding, after much consideration given by themselves to the evidence. The Chief Justice, who analysed the evidence given by the witnesses, has pointed out various circumstances which appear to him to corroborate them. The learned Chief Justice thought that Munnoo Lall was present at the time of the negotiations, and that inquiries were made of him. Their Lordships think it is a natural conclusion to draw from all the circumstances that some inquiry would have been made of him, and they think it must be pretty evident from the whole circumstances of the case that, if the defendants had had notice of the mortgage held by the appellant, they would have hesitated to purchase as they did. They took the estate, giving up their decrees, and also an attachment which they held. Their Lordships agree with what is stated by Mr. Leith that there may have been no duty upon Munnoo Lall voluntarily, and without being asked, to disclose his security; but the case is not put simply upon the omission to give notice, but upon an actual misleading of the defendants, not merely by the acts, but by the express declarations of Munnoo Lall himself.

Under these circumstances their Lordships think that they could not have departed from their ordinary rule of not disturbing concurrent judgments upon a question of fact of two Courts, even if they had felt some doubt upon the finding. But, after the discussion of this case, their Lordships are disposed to agree with the findings of the Court below.

If then the issue has been properly found, it is really decisive of the case, because it supports the plain equity that a man who has represented to an intending purchaser that he has not a security, and induced him under that belief to buy, cannot, as against that purchaser, subsequently attempt to put his security in force.

The result is that their Lordships will humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed, with the costs incurred by the respondents previous to the hearing.

The 7th November 1873.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Old Document—Evidence—Possession.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Bisheshur Bhuttacharjee and another

versus

George Henry Lamb and others.

Where a document, which is not proved because of its great age and of there being no witnesses to prove it, is put forward as a document intended to operate as a merasi tenure, it is necessary, in order to establish its authenticity, to show that it was accompanied by possession.

THIS is a suit brought, as far back as the 1st of July 1853, to recover certain talooks or zemindaries from a person who claims under, and stands in the position of, a purchaser at a sale in execution of a decree against the zemindar. When the plaintiff took measures to get into possession of the estate which he had purchased, two leases, called merasi leases, were set up against him; and it was contended that, having purchased only the rights of the zemindar, he had purchased subject to those two leases, and that he was entitled only to the rents under them. The rents amounted to about Rs. 17 more than the Government revenue; so that the plaintiff, if the leases are upheld, instead of purchasing, as he expected, the zemindaries free from incumbrances, purchased the value of about Rs. 17 in excess of the Government revenue.

Their Lordships will take one of those documents as an example. On the face of it it appears to be very suspicious. Chunder Narain Ghose was the zemindar; he states in the pottah that, having purchased the talook Gooroo Dass Roy, and having fixed the annual rent at Rs. 301, "you being my "granddaughter—my son's daughter—and I "having received 15 gold mohurs of the "value of Rs. 20 each from you, which were "received as jotook at the ceremony of "unnoprashon, do grant the same talook to "you by meras lease;" so that he is to be supposed by this document to have sold to

* From the Judgment of Trevor and L. S. Jackson, JJ., in Regular Appeal No. 125 of 1860, decided 17th January 1863.

his granddaughter for 15 gold mohurs, which she received at a certain religious ceremony, a merasi lease at the rent of Rs. 301, which was only Rs. 13 more than the Government revenue which he had to pay. That that is the value is admitted by the defendant in the answer. Indeed, it has not been disputed.

Now the Judges have found that this document had never seen the light from the time when it was granted on the 11th of Srabun 1213 (the year 1806) up to the time when the purchaser under the execution sought to get into possession of the zemindary in 1854; and that, from 1806 to 1854, no public notice, no mention, had ever been made of this lease. When an execution is put in, notice is given of the execution, and any persons claiming rights in the property seized under it have a right to set them up. No claim of that sort was made in the present case. One of the defendants is the son of the granddaughter, and claims to be entitled to his mother's right, but he never set it up when the execution was put in.

Now, in order to satisfy the Court that such a document as this was a valid document intended to operate as a merasi tenure, it would be important to prove that possession had accompanied it. The document itself was not proved, because it was more than thirty years old, and there were no witnesses to prove it. It was therefore necessary, in order to establish its authenticity, to show that possession had accompanied it. In order to corroborate the lease, another document was put in, which is called a bundobust signed by the sons of the grandfather, who were the zemindars in 1817. Now this is an unusual document, and it does not appear for what reason it was executed. If the merasi tenure was a valid one, the granddaughter had the right to the lease, at a rent of Rs. 301, payable yearly. The bundobust is signed by the representatives of the zemindar, and by it they make the rent of Rs. 301 (which, in the pottah, was payable yearly) payable by six-monthly instalments. What reason could there have been, if the granddaughter had got the tenure at a rent of Rs. 301 payable yearly, for her agreeing to pay it by six-monthly instalments, or for the zemindar's granting her this document making it payable by instalments? One can hardly see what the object of this could have been, except for the purpose of making it appear that the lease was treated by the representatives of the zemindar as a genuine document, and thus giving it the appearance of authenticity.

The question then turns upon the point as to whether possession was taken under the document. The Principal Sudder Ameen has found that there was no possession taken under it. He says that the few jumma-wasilbakees, chittahs, kubooleuts, and evidence of ryots and low-caste servants, which had been adduced by the defendants, were all unreliable, the documents being prepared, and the witnesses tutored.

The Judges of the High Court agreed with the Principal Sudder Ameen as to the absence of possession. They said: "Nothing but the most complete and satisfactory "evidence of good faith, coupled with "reasons for the previous absence of all "mention, could enable the defendants to get "over so strong and significant a circumstance. Not once in half a century do "these merasidars appear in Court, not once "have they been sued for rent, not once have "they found occasion to assert or to protect "their tenure until it is brought forward as "the last of a series of measures to prevent "the talooks passing into the hands of the "purchasers." Then they say: "In Chunder Kant's case there is a bundobust paper "of the 25th Maugh 1224, which is said to "be a confirmation of his meras, but neither "the authenticity, nor the occasion of this "document, is sufficiently made out." Here, then, are two concurrent findings of the lower Courts upon the question of fact, whether possession did accompany the documents; and both Courts have found distinctly that the possession was not in accordance with the documents; that the zemindars remained in possession from the time when those meras leases were alleged to have been granted up to the time when the purchaser sought to obtain possession under the sale in execution. But then certain mouzah-waree papers were produced. The Principal Sudder Ameen made certain observations with regard to those papers. The Judges of the High Court, speaking of them, say: "They pro-"duce what are called quinquennial or "mouzah-waree papers from the Collector's "office of the Bengalee year 1217, in which "the meras tenures are specified. And in "the case of Jugol Kishore a register-book "is produced in which these papers are "referred to. But the appellants fail to "show for what reason these mouzah-waree "papers, filed by the zemindar in the Collectorate, should contain a specification of "under-tenures with which the Collector

"had no concern; and as to the so-called "register-book, we are not informed under "what regulation or rule of practice it was "kept; nor have the defendants taken the "evidence of the Collectorate officers to "throw light on the subject." Now it is contended that the Judges were wrong in making these remarks; but the fact of the Judges making a mistake, even if they did make a mistake, with reference to the mouzah-waree papers, does not affect the other part of their finding, *viz.*, that the leases had never been made public; that they had never seen the light; and that possession had never accompanied them. Even if they did make a mistake with regard to the mouzah-waree papers, it would not be a sufficient reason for their Lordships reversing the finding upon the other question of fact. One of the Judges, who gave judgment upon a motion for review of judgment, says: "The sole ground taken, and ably "argued at the hearing by Mr. Plowden, "was that the Court had come to an erro-"neous conclusion with respect to the "mouzah-waree papers, which had been relied "on to prove the existence of the talooks. "I am now inclined to believe that the "papers in question, though not precisely in "the form prescribed by the Regulation, were "nevertheless prepared in accordance with "the instructions of the Board of Revenue." Therefore he admits they were mistaken, but he says: "Even if this be fully conceded, the "fact will not outweigh the other consider-"ations which led us to disbelieve the real "existence at the present time of the tenures "in dispute. And, with that feeling of dis-"belief upon our minds, produced by a review "of the whole evidence, we certainly could "not reverse the judgment of the Court "below, simply because it had assigned "reasons for its judgment which did not "appear to be extremely cogent."

The Principal Sudder Ameen's judgment is also objected to. It is said that he has given certain reasons which are not borne out by the evidence, and it must be admitted that there are mistakes in the judgments both of the Principal Sudder Ameen and of the High Court, and that they are perhaps not so satisfactory as they might have been; but the question is whether their Lordships are satisfied that they have come to a wrong conclusion upon the evidence.

Now, so far from that being the case, their Lordships are of opinion that, if they had been reviewing the judgment of the Principal Sudder Ameen, they would have arrived at the same conclusion as the High Court did that the documents were not genuine documents intended to operate in the way in which they professed to operate.

Under those circumstances, their Lordships are of opinion that the rule by which they are usually guided in not overturning the decision on a point of fact of the lower Court, when that decision has been affirmed by the High Court, must apply in the present instance.

They, therefore, will humbly advise Her Majesty that the decision of the High Court be affirmed, together with the costs of this appeal.

The 26th November 1873.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Act XXVII. of 1860—Certificate of Administration.

Case No. 217 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 8th April 1873.

Chundro Monee Debia (*Appellant*)

versus

Rash Beharee Chowdhry and others (*Respondents*).

Baboo Debendro Narain Bose for *Appellant.*

Baboo Kashee Kant Sen for Respondents.

Where a widowed daughter applied for a certificate under Act XXVII. of 1860, claiming under the will of the deceased, which was established without dispute, the District Judge was held to have done right in granting the application; the law in question not creating a title in the party obtaining a certificate.

Kemp, J.—This is an appeal on the part of the granddaughter of one Dhun Monee, deceased. Sookh Moyee, the widowed daughter of the deceased, applied for a certificate under the provisions of Act XXVII. of 1860, and in support of her claim she filed a will executed by the deceased on the 13th of Assar 1276. This application was opposed by three parties: *Firstly*, by Chunder Monee, the granddaughter of the deceased, appellant before us; *secondly*, by Rash Beharee, the son of a daughter of Dhun Monee; *thirdly*, by another daughter of Dhun Monee on behalf of her four minor sons.

The Judge has given the petitioner a certificate, finding that the will of Dhun Monee has been established, and that the will is not

disputed by the objectors. At the end of his decision, the Judge states that the 2nd and 3rd objectors are the legal representatives of Pertab Chunder, the deceased grandson of Ram Coomar Chowdhry, and that they are entitled to a joint certificate with respect to the dur-putnee of Balooghurra—that is, as we read the decision, with respect to the estate of Pertab Chunder. With reference to the appeal of Chundro Monee, no doubt the decision of the Judge is correct. The will of the deceased having been proved and not being disputed, the petitioner, under that will, is entitled to a certificate. Act XXVII. does not create a title in the party obtaining a certificate. The object of the Act is simply to facilitate the collection of debts, and to remove all doubts as to the legal title to receive and collect those debts.

We dismiss the appeal of Chundro Monee, and with reference to the question as to whether the Judge was wrong in granting a joint certificate to the objectors Nos. 2 and 3, it is sufficient to observe that, if this certificate has been granted by the Judge to them as representing the estate of Dhun Monee, such a certificate cannot be granted under the provisions of Act XXVII. of 1860; but, if granted to them, as it would appear to be on our construction of the Judge's decision (such certificate not being on the record) as representing the estate of Pertab Chunder, the objection is not tenable.

The appeal will be dismissed with costs.

The 26th November 1873.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Declaratory Suit—Res-judicata—Presumption under Act X. of 1859, s. 4.

Cases Nos. 49, 50, and 51 of 1873.

Special Appeals from a decision passed by the Subordinate Judge of Rungpore, dated the 6th September 1872, reversing a decision of the Moonsiff of that District, dated the 19th June 1871.

Ishan Chunder Roy Chowdhry (Defendant), *Appellant,*

versus

Bhyrub Chunder Doss and others (Plaintiffs), *Respondents.*

Baboos Sreenath Doss, Mohinee Mohun Roy, and *Tarinee Kant Bhuttacharjee* for Appellant.

Baboos Unnoda Persad Banerjee and *Doorga Mohun Doss* for Respondents.

A zemindar having sued a ryot for rent, the defendant pleaded to a lower rate than that claimed, and set up a mokurruree tenure. The suit was decreed, and an appeal therefrom was dismissed. The ryot then brought an action in the Civil Court to have it declared that he had a mokurruree tenure. This suit was dismissed by the first Court; but the Lower Appellate Court reversed the decision, relying mainly upon a presumption under s. 4 of the Rent Law:

HELD that the declaratory suit was not barred by the Deputy Collector's decision in the rent-suit:

HELD that the Lower Appellate Court was wrong in raising the presumption of uniform payment.

Kemp, J.—THE defendant (the zemindar) is the appellant in these cases. It is admitted that one judgment will govern the three appeals. The ryot was originally sued by the zemindar for rent. The zemindar pleaded that the jumma hitherto paid by the ryot was Rs. 23-6-8; the defendant (the ryot) pleaded that the jumma was only Rs. 23-2-8, and he also, in the rent-suit, set up a mokurruree tenure. The Deputy Collector held that the mokurruree had not been established, and that the gozashta jumma was as stated by the zemindar. He therefore gave the zemindar a decree, and on appeal this decision was affirmed by the superior Court. The ryot then brings the present suit to have it declared that he has a mokurruree tenure. It is clear that this is a declaratory suit.

Subsequent to the plaint being filed, the first Court directed the plaintiff to file an additional stamp, inasmuch as the stamp on which the plaint was originally engrossed was not equal to Rs. 10, which is the stamp required for a declaratory suit.

The zemindar took several objections, first, that the suit was barred under the provisions of section 2, Act VIII. of 1859; that the question of the mokurruree title of the plaintiff (the ryot) had been disposed of in the rent-suit, and could not be re-opened in a suit in the Civil Court. He also on the merits stated that the plaintiff had no mokurruree right, and that the jumma was as stated by him in the rent-suit, namely, Rs. 23-6-8.

The first Court was of opinion that the ryot (the plaintiff) had entirely failed to prove his mokurruree right. The Moonsiff also held that the "hisabs" put in by the plaintiff had not been proved, and he therefore dismissed the ryot's suit.

On appeal, the Subordinate Judge has reversed that decision. The Subordinate Judge appears to us to have relied mainly upon a presumption under section 4 of the Rent Act. He appears to have thought that the ryot had established payment of rent at a uniform rate for a period of twenty years prior to suit. The Subordinate Judge also takes objection to the manner in which the first Court had examined the witnesses with reference to the "hisabs," and observes that it was very improper of the Moonsiff to cover over one-half of the signatures to be attested by the witnesses, and to reject their evidence, because the witnesses were unable, with the signatures so covered, to identify those signatures; and he thought that that was an improper way of examining witnesses. He held that the ryot had proved uniform payment for twenty years, and he therefore gave the plaintiff a decree.

The zemindar now appeals. The first question to dispose of is whether the decision of the Revenue Court is a bar to the present case in the Civil Court. We think that decision is no bar to the present suit. The question whether this was a mokurruree or not was not in issue in the rent-suit; the only question then at issue being what was the gozashta jumma, namely, whether it was, as alleged by the zemindar, Rs. 23-6-8, or Rs. 23-2-8 as alleged by the tenant—a difference of 4 annas, and on that issue the finding was against the ryot. There is nothing in that finding to preclude the ryot from bringing a declaratory suit, as he has done in the present case.

The next question is whether the Subordinate Judge was right in raising a presumption under section 4. Considerable argument was heard on this point. We think that the Subordinate Judge was wrong in raising that presumption. The suit is a declaratory suit, and such a suit is not provided for, either by Act X. of 1859, or Act VIII. of 1869 (B.C.) It is true, as contended by Baboo Unnoda Pershad Banerjee, that Act VIII. of 1869 (B.C.) was passed to amend the procedure in suits between landlord and tenant; and if this were a suit which comes under Act VIII. of 1869 (B.C.), the procedure no doubt would be according to Act VIII. of 1859; but section 34 of Act VIII. of 1869 (B.C.) enacts that, "save as in this Act is "otherwise provided, suits of every descrip-"tion brought for any cause of action arising "under this Act, and all proceedings therein, "shall be regulated by the Code of Civil "Procedure passed by the Governor-General "in Council, being Act VIII. of 1859." No this is clearly not a suit brought for any cau of action under Act VIII. of 1869 (B.C.). is a declaratory suit brought by the plaintiff the Civil Court to establish his title. Th plaintiff, therefore, must prove his case, eith by a written contract, such as a pottah, or b satisfactory evidence, that his tenure was existence at the time of the Permane Settlement, and that he has paid a unifor rate of rent ever since.

Now, in this case, the ryot has filed pottah; he has given no satisfactory reaso why he was unable to file his pottah; he h not stated when the tenure was created; an has only put in some "hisabs," which do n extend further back than 1235. We think therefore, with the first Court, that the plain iff has wholly failed to establish his moku ruree title. We reverse the decision of th Subordinate Judge, dismiss the suits of th ryots (the plaintiffs), and decree these appeal with costs payable by the ryots (special respondents).

The 26th November 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Regulation XIX. of 1793, s. 6—Dependant Talookdar—Forfeiture of Lease.

Case No. 410 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 6th September 1872, affirming a decision of the Sudder Moonsiff of that District, dated the 16th September 1871.

Junmejoy Mullick and another (Plaintiffs), *Appellants,*

versus

Gunga Ram Dutt and another (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Ram Churn Mitter* for Appellants.

Baboo Bhowanee Churn Dutt for Respondents.

A lessee whose interest is that which is declared by Regulation XIX. of 1793, s. 6, is a dependant

lookdar, and does not forfeit his lease by simply sitting to renew his temporary settlement on its expiration.

Markby, J.—We see no reason to interfere with the judgment of the Lower Appellate Court in this case. The third ground of appeal is that the term of the settlement under which Eshan Chunder held the lands having expired, and no fresh arrangement having been entered into, the possession of Gunga Ram, who derives his title from Eshan Chunder, ought to have been held to be that of a trespasser, and the suit of the plaintiffs, special appellants, for khas possession, ought to have been decreed. It seems that Eshan Chunder was a person whose interest was that which is declared by section 6, Regulation XIX. of 1793, the land being under 100 beeghas, and having been resumed by Government on its own behalf. The Government subsequently transferred its rights to the plaintiff. Now the interest which Eshan Chunder would take under the provisions of that section is that of a dependant talookdar, and no provision of law has been shown to us by which a dependant talookdar forfeits his interest by the simple reason that no fresh arrangement is made by him on the expiration of his temporary settlement. It is now urged that it is alleged in the plaint that he refused to take a fresh settlement. What the effect of that refusal, if proved, would have been, it is not necessary for us to consider, because there does not appear to have been any attempt to establish that allegation by evidence. Neither Court has found it to be a fact that there was such a refusal, and there is no ground of appeal. The lower Courts ought to have found that this refusal took place. The contention was that Eshan Chunder had, by simply omitting to renew his temporary settlement, forfeited his lease, and the real question which was discussed in the lower Courts and upon which the plaintiffs have failed, and we think rightly, was that the interest of Eshan Chunder was that of a jotedar only, whereas in the words of the law it is quite clear that his interest was that of a dependant talookdar.

The special appeal will be dismissed with costs.

The 27th November 1873.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Right of Fishery (Julkur)—River—Channels.

Case No. 120 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 27th September 1872, affirming a decision of the Officiating Subordinate Judge of that District, dated the 13th March 1872.

Krishnendro Roy Chowdhry (Defendant), *Appellant,*

versus

Maharanee Surno Moyee (Plaintiff), *Respondent.*

The Advocate-General and *Mr. C. Jackson* and *Baboos Gopal Lall Mitter, Kalee Mohun Doss,* and *Doorga Mohun Dass* for Appellant.

Baboo Sreenath Dass for Respondent.

A party owning the right of fishery in a river from the time of the permanent settlement is at liberty to exercise that right in the open channels, and also in all closing or closed channels abandoned by the river up to the time when the channels become finally closed at both ends, *i.e.*, so long as fish can pass to and fro.

Ainslie, J.—The question at issue in this case is one of *julkur.* The plaintiff, respondent, claims the right as part of her *julkur* Dig Dhoolia. The defendant's case, as stated by the Judge of the first Court, was that the *julkur* was appurtenant to his estate of Bhitterbund, the land adjacent on both sides and subjacent belonging thereto, and that there was no communication with the river. The issues raised by the Subordinate Judge were, as far as it is necessary to consider them, in the first place, whether the plaintiff was estopped by previous admissions; and, second, whether the *julkur* in suit was a parcel of *julkur* Dig Dhoolia, or whether by its condition and local position it was the right of the plaintiff or of the defendant. The Subordinate Judge says that it is not denied by the defendant that *julkur* Dig Dhoolia belongs to the plaintiff, and he goes on to say that this right is proved by the decree of the 31st of July 1861. Then he says that the Dhulna river formerly flowed through what is now the churrah or disputed *julkur;* that before the Dhulna flowed there,

The 28th November 1873.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Obiter Dicta—Evidence.

Case No. 69 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 12th July 1872, reversing a decision of the Moonsiff of Howrah, dated the 15th March 1872.

Huro Doss Dosteedar (one of the Defendants), *Appellant,*

versus

Sreemutty Huro Pria (Plaintiff), *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondent.

A presumption made in a former case, being only a *dictum* with reference to a matter immaterial to the decision of that suit, cannot be proof of the thing presumed.

Ainslie, J.—The judgment of the Lower Appellate Court in this case must be set aside. The Subordinate Judge is clearly wrong on the point of law that there is a distinction between brothers who have never separated and brothers who have re-united after separation in respect of the succession to the property of a deceased brother. The point has been decided in several cases, and it is unnecessary to go into it at length.

Then, as to the facts, it is quite clear that his judgment is wrong in several particulars. He says that the defendant Huro Doss states that the plaintiff's husband, Kishen Churn, lived separately, and the remaining three brothers lived together; but that there is no evidence on the record to show that they lived together. It has been shown to us that this is a mistake altogether, as there is evidence whatever it may be worth.

Then, again, he relies upon a former decision, and says: "Again the fact of the "plaintiff's husband being proprietor in "possession of the 8-annas share on the "ground of inheritance from his father and "brothers has been proved by the deci-"sion No. 1 (of 1866) filed by the plaintiff." Now nothing of the kind could possibly be proved by that decision, because the plaintiff in that case had only claimed contribution to the extent of 4 annas; he had waived what, on the defendant's statement, he might have claimed, and the point whether he was entitled to 4 annas or 8 annas did not ari... The Judge, in that case, has undoubted... stated that presumably he would be entitl... to 8 annas; but that is no decision at all, it ... only a *dictum* with reference to a mat... wholly immaterial to the decision of th... suit.

Then, on the point of limitation, he goes ... the same decision, and makes considerab... use of it; in fact, but for that decision, it ... extremely doubtful whether the judgme... would not have been quite the other wa... The judgment of the Lower Appellate Co... appears to us altogether faulty, and the... seems to be no reason for interfering wi... the judgment of the first Court. We there... fore restore that judgment, reverse the dec... sion of the Lower Appellate Court, and decr... this appeal with costs.

The 28th November 1873.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Right of Suit—Delegated Powers—Primar... Evidence.

Case No. 1790 of 1872.

Special Appeal from a decision passe... by the Subordinate Judge of Rajshahye... dated the 5th September 1872, affirmin... a decision of the Moonsiff of Pubna... dated the 12th October 1871.

Gobind Chunder Dutt (Defendant), *Appellant,*

versus

Oodoy Chunder Sen (Plaintiff), *Respondent.*

Baboos Sreenath Doss, Grija Sunkur Mo... joomdar, and *Shushee Bhoosun Dutt* for Appellant.

Baboos Bungshee Dhur Sen and *Romes... Chunder Mitter* for Respondent.

When a suit is instituted by a person whose right to represent the nominal plaintiff is challenged by the defendant, such person is bound to prove that he has been properly authorized to sue as he does, and to bring into Court the primary evidence in his possession.

Ainslie, J.—We think this suit ought to be dismissed. It is perfectly clear that it was instituted by a person who had no right to represent the nominal plaintiff, Mr. Macintosh, at all. Mr. Macintosh gave a power to Mr. Terry, or is supposed to have

given a power to Mr. Terry, who gave a power to Oodoy Chunder, who gave a power to Punchanund Raoot, who, after these successive delegations, takes upon himself to sign Mr. Macintosh's name. The defendant objected from the very first that the suit was not instituted by a person properly authorized. Under the circumstances the plaintiff was bound to prove the powers successively given, supposing that these powers, if proved, did convey a right to Punchanund Raoot to use the name of Mr. Macintosh. The very first step of proof is wanting. There is no power from Mr. Macintosh to Mr. Terry on the record, and we are asked to accept, in lieu of it, an endorsement on the power given by Mr. Terry to Oodoy Chunder by a Sub-Registrar, who believed that the original power from Macintosh to Terry warranted the first delegation by Terry. This is secondary evidence of a very inferior class, if evidence at all. The primary evidence was in the possession of the plaintiff himself or of his agent, and he was bound, on the challenge of the defendant, to bring it into Court. It is impossible to say, as the matter stands, whether Punchanund Raoot had any right whatsoever to sign Mr. Macintosh's name, or whether Mr. Macintosh is in any way bound by what Punchanund does.

The special appeal will be allowed, and the judgments of the lower Courts reversed with costs payable by the respondent, who has appeared and opposed the appellant, and who, on the examination of the vakalutnama, appears to be Oodoy Chunder.

The 3rd December 1873.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Certificate under Act XXVII. of 1860—Widow—Adopted Son.

Case No. 270 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 25th June 1873.

Bissumbhur Shaha Chowdhry, *Appellant,*

versus

Sreemutty Phool Mala Chowdhrain, *Respondent.*

Baboo Bykunt Nath Doss for Appellant.

Baboo Kishen Dyal Roy for Respondent.

A widow, who is admittedly the heiress of the deceased, claiming under a will executed by her husband, is a proper person to obtain a certificate of administration, notwithstanding the objection of an adopted son.

Kemp, J.—We think this special appeal must be dismissed with costs. It is clear in this case that the widow of the late Kristo Mungul Roy has obtained a certificate under the provisions of Act XXVII. of 1860. The petitioner, alleging himself to be the adopted son of Kristo Mungul Roy, applies for a certificate, and asks the Court to cancel the certificate granted to the widow. The widow opposes this application, and sets up a will executed by her husband, under which she claims a life-interest in the property. She also contends that the adoption is not a legal one on various grounds.

The Judge has refused to recall the certificate granted to the widow, and has referred the petitioner to a regular suit. The grounds of appeal are that the Lower Appellate Court, after finding that the will is forged and fraudulent, is wrong to withhold jurisdiction, and not to recall the certificate obtained by fraud.

The Judge has not found that the will is forged or fraudulent; he says it may be a spurious document, and he has also made some remarks as to the adoption which he seems to have doubted; but, be that as it may, it is clear that, in so far as the question as to who is to be the proper personal representative of the deceased is concerned, the widow, who is admittedly the heiress barring this adoption, is undoubtedly a proper person to obtain a certificate under the Act. The appellant may bring his suit if so advised.

The appeal will be dismissed with costs.

The 5th December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Representative of deceased Decree-holder—Execution—Co-decree-holders—Act VIII. of 1859, ss. 207 & 210.

Case No. 238 of 1873.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Bhaugulpore, dated the 29th April 1873.

Umrith Nauth Chowdhry and another (Judgment-debtors), *Appellants,*

versus

Chunder Kishore Singh (Decree-holder), *Respondent.*

Mr. M. L. Sandel for Appellants.

Baboos Hem Chunder Banerjee and *Gocool Chunder Sircar* for Respondent.

The representative of a deceased person in whose favour a decree has been made cannot claim execution as a matter of strict right; but must satisfy the Court under s. 210, Civil Procedure Code, that it is proper that he should be allowed satisfaction of the decree; and the Court cannot determine the question without hearing the opposite side.

A co-decree-holder has no right to claim execution unless he satisfies the Court, within the provisions of s. 207, that there was sufficient cause for his asking to have execution alone; and in order to this, the Court must hear all that the judgment-debtors have to urge against the application.

Phear, J.—THERE appears to have been unfortunate irregularity and confusion in the treatment of this matter by the lower Court.

One Chunder Kishore Singh, called in these papers before us the decree-holder, applied to the Subordinate Judge to obtain execution of certain decrees against Umrith Nauth Chowdhry and others, judgment-debtors. The case of the applicant was that he was the son-and-heir of one Munrunjun Singh, the decree-holder. The answer, as we understand it, which was put in by the judgment-debtors or some of them, to meet this application, was in effect this: First, that you are applying for the execution of several decretal orders, and Munrunjun Singh was not in fact a party to all those orders. Next, that, even in regard to the decretal orders to which he was a party, he was only a co-decree-holder with others, and those others you have not joined with you in this application. And, thirdly, although you may be the son-and-heir of Munrunjun Singh, still you have no right to represent him in this matter, because he was only a furzee party in regard to those decretal orders.

These objections seem to be of very considerable importance; each one of them goes immediately to the right of the applicants to have the order for which they ask.

To take the last of them first. The representative of a deceased person in whose favour a decree has been made cannot claim execution of that decree as a matter of strict right. According to the provisions of section 210 of the Civil Procedure Code, he must first satisfy the Court that it is right and proper that he should be allowed to have execution and satisfaction of the decree. The Court could not determine a question of this kind rightly, unless it heard from the opposite side, that is, the judgment-debtors, all the objections that could be urged to the application. Again, even if Munrunjun Singh had been before the Court, supposing it to be true, as the judgment-debtors allege that he was only a co-decree-holder with others, he would have no right to claim execution of the decree on his own application alone unless he satisfied the Court within the provisions of section 207 of the Civil Procedure Code that there was sufficient cause for his asking to have execution alone. And he could not rightly satisfy the Court to that effect in the absence of the other side. The Court ought to have heard all that the judgment-debtors had to urge against granting his application, and it ought particularly to scrutinize such reasons as he might give for not joining the other people with him. In the present instance, we are told by the judgment-debtors that they have paid the co-decree-holders of Munrunjun Singh their shares, whatever they may be, of the money due under the different decrees, or at any rate some of these moneys. If that be so, and moreover, if that payment has been made out of Court, as it is said it has been, and within the scope of section 206 of the Civil Procedure Code, it is especially important that these decree-holders should be before the Court when the question is discussed and dealt with whether Munrunjun Singh or his representative should be allowed to have execution of the whole decree alone. And it need hardly be remarked in addition that it is a most serious question for the judgment-debtors whether Munrunjun Singh, whom the present applicant seeks to represent, is entitled to execute all the decrees or not. It therefore seems on the whole, that there has been an entire miscarriage of the present matter in the Court below, and accordingly we feel ourselves obliged to reverse the decision of the Subordinate Judge, and send the case back to him for re-trial and re-hearing.

The appellant will have his costs in this Court, and we allow one gold mohur for pleader's fees.

The 5th December 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Decree for a Kubooleut—Act X. of 1859, s. 81.

Case No. 482 of 1873.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 24th December 1872, affirming a decision of the Moonsiff of Pothna, dated the 30th May 1872.

Shaikh Misser (Defendant), *Appellant*,

versus

Kazee Syud Naser Ali (Plaintiff), *Respondent*.

Baboo Umbika Churn Bose for Appellant.

Baboo Bama Churn Banerjee for Respondent.

Before a decree which requires a person to execute a kubooleut can be used as evidence of the amount of the rent claimable, the decree-holder must take the steps prescribed in Act X. of 1859, s. 81.

Couch, C.J.—The plaintiff having obtained a decree in a resumption-suit in April 1867, brought a suit for a kubooleut, and obtained an *ex-parte* decree against the defendant on the 10th of February 1868. Nothing appears to have been done upon this decree in accordance with section 81, Act X. of 1859, which is applicable to these proceedings; but the plaintiff brings a suit on the 10th of April 1872 to recover rent according to the *ex-parte* decree.

Section 81 says that where there is a decree given for the delivery of a kubooleut, if the person required by the decree to execute the kubooleut shall refuse to execute the same, the decree shall be evidence of the amount of rent claimable from him, and a copy of the decree, under the seal and signature of the Court, shall have the same force and effect as a kubooleut executed by such person.

Here the plaintiff has not done that which, by the terms of this section, is necessary before he can use the decree as evidence of the amount of the rent claimable, and in the same way as if a kubooleut had been executed by the defendant. The omission of the plaintiff to require the defendant to execute a kubooleut is most material, for the decree being *ex-parte*, the defendant says that he did not know of it; and, if any steps had been taken to execute it, and he had been required to give a kubooleut, he could have made an application, under section 58 of Act X., to have the decree set aside. He was not able to do this, and the Court, in this suit, ought to have seen that the plaintiff had complied with section 81 before it gave to the decree in the suit for the kubooleut the effect of fixing the amount of the rent which the defendant was to pay.

A case in the 22 Weekly Reporter, page 273, has just, while we are giving judgment, been referred to, and therefore we need not say anything more than that it is in point, and we quite concur with it. It is the opinion which I had come to before the case was brought to our notice. The decrees of both the lower Courts must be reversed, and the suit of the plaintiff dismissed with costs in all the Courts.

The 5th December 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Rent-suit—Notice of Enhancement.

Case No. 492 of 1873.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 5th December 1872, affirming a decision of the Moonsiff of Burjorah, dated the 2nd September 1872.

Banee Madhub Chowdhry (Defendant), *Appellant*,

versus

Tara Prosunno Bose (Plaintiff), *Respondent*.

Baboo Tarucknath Sen for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondent.

A notice of enhancement ought to inform the tenant or ryot of the grounds on which the landlord seeks to

have the higher rent, and not merely to specify all the grounds mentioned in the rent-law, some of which may apply to one part of the land, and some to another.

Couch, C.J.—THE Act provides that an under-tenant or ryot shall not be liable to pay a higher rent unless a written notice is served upon him specifying the rent which was demanded of him for the ensuing year, and the grounds upon which an enhancement of rent is claimed. The intention of that is that the under-tenant or ryot shall be informed of the grounds upon which the landlord seeks to have the higher rent. This is not satisfied by giving a notice specifying all the grounds of enhancement mentioned in the Act, some of which may apply to one part of the land, and some to another. It leaves the tenant in uncertainty as to the grounds upon which the higher rent is demanded. It does not give him the information which, we think it was intended, he should have. In this case there are 59 plots of land containing altogether 124 beeghas. It is impossible to suppose that the same grounds of enhancement, even if they were consistent, would apply to every plot. One part may be subject to enhancement on one ground, and another part on another, and this notice does not enable the tenant to tell what it is that the landlord really asserts as to his right to enhance.

The notice in the first of the two cases which have been quoted, that in 8 Weekly Reporter,* was not similar to the notice in this case. The decision in that case cannot perhaps be considered as an authority for anything more than that the notice must be such as to enable the tenant to understand upon what ground the enhancement is claimed.

As to the recent case in 20 Weekly Reporter, we do not know what the form of the notice was. We concur in the rule which is generally stated there that, if the notice is such as that it is impossible for the ryot to know what case he has to meet, the notice is bad. The defect in the notice cannot be cured by the landlord when the case comes on to be tried, abandoning some of the grounds stated in it. He has no right to keep the tenant in a state of uncertainty as to what the grounds are that he is going to rely upon. The tenant has a right to know that beforehand.

In this case we think the notice is bad, and that the decrees of the lower Courts should be reversed, and the suit be dismissed with costs.

* Page 330.

The 11th December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Petitions—Witnesses—Evidence.

Cases Nos. 224, 225, 253, 300, and 301 of 1873.

Special Appeals from a decision passed by the Judge of Shahabad, dated the 7th September 1872, modifying a decree of the Moonsiff of that District, dated the 29th June 1872.

Mohun Sahoo and others (Plaintiffs), *Appellants,*

versus

Chuttoo Mowar (Defendant), *Respondent.*

Mr. Mun Mohun Ghose and *Babu Mohendro Lall Mitter* for Appellants.

Baboo Kally Kishen Sein for Respondent.

Where a party asks others to verify his signature to a petition, or to identify him as one of the petitioners, it amounts to an allegation on his part that he made the statements which appear in the petition, and is as effective evidence against the party making the request as if the petition were in fact filed.

Phear, J.—WE have here five different suits brought up to us simultaneously on appeal, because they have been all determined in the Lower Appellant Court by one judgment. It seems to be unfortunate that this should have been the case. Of the five, two were against Chuttoo Mowar; two others against Bahorun Mowar; and the fifth was against Rajwant Mowar. They were instituted at different times, and ought properly to have been each tried upon its own merits, *i.e.*, each upon the materials put before the Court in the particular case. The result of trying

em all together has been that, inasmuch the judgment of the Lower Appellate ourt is certainly materially defective in one rticular, the decision falls to the ground all the cases at once.

The plaintiff in all five cases sued upon e footing of a kubooleut which, he said, e respective defendants had given him. the different cases the kubooleut seems to ve been attempted to be proved by oral stimony, and in the cases against Chuttoo lowar and Bahorun Mowar, the testimony the witnesses was corroborated by the roof of a so-called petition, in which the fendants were represented as having knowledged the kubooleut. But, in the th case, as we understand, there was no rroborative evidence of this kind; neverheless the Lower Appellate Court has been d to suppose that the character of the evience in all the five cases was exactly the ame.

In the case, which is Special Appeal No. 125, the first suit against Chuttoo Mowar, he Judge says: "The lower Court, on "the ground that the defendant's father "acknowledged, by his petition dated 11th "February 1865, that he held the said land "under kubooleut, decrees the claim." And a little further on in the judgment, the Judge says: "There are now two witnesses "called to the kubooleut, whose evidence to "prove the kubooleut is rejected; and there "remains therefore but the petition of the "11th February said to have been filed in "the Collectorate by the defendant's ancestor. "Now I observe that the two witnesses to this "point, *viz.*, Luchmun Pershad and Jugdun "Sahai, each states that they attested the "petition to be as represented, *i.e.*, that they "signed the petition returning it to the "defendant's father. Their signatures were "simply to the fact that the men who were "represented in the petition as the petitioners "were known to them; neither of them say "that the petitioners filed that petition in "their presence; and from the whole facts of "the case I very much doubt that that peti-"tion was ever filed, as it is now attempted "to be made out."

Accordingly, the Judge appears to think that this petition is not made out by the plaintiffs, made out to be of any value as evidence, and he disregards it, giving in the end a decree which may be said to be favourable to the defendant in so far as the plaintiff now appeals against it. But the Judge, in his remarks upon this petition, stops short of saying that he disbelieves the witnesses who deposed to the fact of the defendant's father having brought it to them for their certificate of identification.

Now if these witnesses are truthful on the point, and if the defendant's father did, as they say, represent to them that this petition was his petition, and asked them to verify his signature, or to identify him as one of the petitioners, then this amounts, as completely as can be, to a statement on the part of the defendant's father to these witnesses of all that is contained in the petition. If it be the fact that the defendant's father asked them to represent that this was his petition, it amounts to nothing more nor less than a statement to them on his part that he made the statements which appear in the petition. And, if the Judge believes that such a statement was made, it was just as effective an evidence against the defendant in the present suit as if the petition had been in fact filed. The Judge does not explain why it is that he doubts that the petition was ever filed. We are told that it comes into the record of the case from the file of the Collector, and if that was so, and if these witnesses' testimony be believed, the natural inference is that it was filed by the petitioner, or at the petitioner's request. But, whether this be so or not, as has already been remarked, if the testimony of these witnesses, as to the representation made to them by the defendant's father, be trustworthy, then the petition is as good evidence against the present defendants as if it had been in fact filed in the Collectorate.

On this ground we think that the Judge has wrongly put aside evidence which he ought to have considered and given effect to in judging of the merits of this case. Although this petition does not appear to have been in any way evidence in the case against Rajwant Mowar, still, inasmuch as the judgment is, by which this case is determined, based upon it, and for that reason cannot be supported in its present shape, the decision of the Lower Appellate Court must be reversed in Rajwant Mowar's case as well as in the others.

Accordingly we reverse the decision of the Lower Appellate Court in all these five cases, and remand them to that Court for re-trial.

We think that they ought to be treated separately, and each one made to depend upon the merits special to it which appear in its own record.

Costs to abide the event in all these cases.

The 12th December 1873.

Present:

The Hon'ble W. Ainslie, *Judge.*

Written Contract—Variation—Evidence.

Case No. 1535 of 1873.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 7th April 1873, modifying a decision of the Moonsiff of Diamond Harbour, dated the 22nd June 1872.

Pearee Mohun Mookerjee (Plaintiff), *Appellant,*

versus

Brojo Mohun Bose (Defendant), *Respondent.*

Baboo Ashootosh Mookerjee for Appellant.

No one for Respondent.

In order to establish variation in a written contract, it must be distinctly pleaded and proved when and how the variation took place; the mere fact of a kubooleut not having been enforced in the most stringent manner does not take away from the lessor the right to enforce it.

In this case the judgment of the Lower Appellate Court must be reversed. The plaintiff sued upon a kubooleut which was given to Government many years ago. There is no question that this kubooleut is a genuine document, and that it contains provision that the rents are to be paid in monthly instalments. The Judge says: "The "question therefore appears to be whether, "by so doing" (that is, not taking the rents in monthly instalments), "the plaintiff has "led the defendants to suppose that he has "substituted another agreement for that into "which they originally entered; and if so, "whether he is now debarred from insist- "ing on the terms of the original agreement "being carried out."

Now the defendant clearly holds under a contract reduced into writing. If that contract has been varied, I hold under the authority of the case reported in the Special Number of the Weekly Reporter, page 13, that it should have been distinctly pleaded and proved when and how the variation took place. The mere fact, that payment of the rent has not been enforced in the most stringent manner in which the zemindar might have enforced it, does not take away from him the right to enforce it now whenever the tenant falls into arrears. The consequence is that the plaintiff must obtain a decree for arrears, to be recovered according to the instalments entered in the kubooleut, with costs.

The 12th December 1873.

Present:

The Hon'ble W. Ainslie, *Judge.*

Rent-suit—Title—Act VIII. (B C.) of 1869, s. 102.

Cases Nos. 711 and 712 of 1873.

Special Appeals from a decision passed by the Officiating Judge of Dacca, dated 31st December 1872, reversing a decision of the Additional Moonsiff of Manickgunj, dated the 13th September 1872.

Shaikh Dilbur and others (Defendants), *Appellants,*

versus

Issur Chunder Roy and others (Plaintiffs), *Respondents.*

Baboos Chunder Madhub Ghose and *Hurro Mohun Chuckerbutty* for Appellants.

Baboos Doorga Mohun Doss, Anund Chunder Ghosal, and *Bhowanee Churn Dutt* for Respondents.

In a suit for rent in which the defendant (ryot) sets up the title of a third person who is not made a party, the decision cannot be considered a binding decision in respect of title as between parties having conflicting claims to the land, within the meaning of Act VIII. (B.C.) of 1869, s. 102.

The preliminary objection taken by the respondent in this case must prevail. Section 102, Act VIII. of 1869 (B. C.), bars an appeal in a suit tried and decided by the District Judge in which the amount sued for is less than Rs. 100, and where "a question relating to a title to land or to some "interest in land, as between parties having "conflicting claims thereto, has not been "determined by the judgment." The parties to this suit are the zemindar on one side and the ryot on the other. A third person came forward to set up a title to the land, but his application was not accepted, and he never was made a party to the suit. The learned pleader for the appellant argues that a tenant has a right to set up the title of the person to whom he believes he is bound to pay the rent claimed, if that person has not been made a party to the suit, and that, before making any decree for arrears of rent, the Court must adjudicate as between him and the plaintiff on the title of that person. It is quite true that, for the purpose of making any such decree, the Court must determine

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whether the defendant is the tenant of the plaintiff; and it follows that, in doing so, it must also determine whether the defendant is or is not the tenant in respect of the particular land of which rent is claimed in the suit of some third party; but I do not think it can be said that the defendant is a representative of that third party so as to make the decision in the suit one in respect of title to land as between parties having conflicting claims thereto. It is quite clear that the absent party whose title is set up by the tenant would not be bound by any judgment adverse to his title arrived at in the suit for rent against the tenant. It cannot therefore be said that, in this case, there has been any decision binding upon parties having conflicting claims to the land. Under the express words of section 102, the preliminary objection must prevail, and this appeal must be dismissed with costs.

No. 712 will be governed by the same decision.

The 12th December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act VIII. of 1869 (B. C.), s. 80—Distraint—Issues.

Case No. 255 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Tirhoot, dated the 16th September 1872, affirming a decree of the Moonsiff of that District, dated the 28th June 1872.

Doonee Mahtoe (Plaintiff), *Appellant,*

versus

Sheo Narain Singh and others (Defendants), *Respondents.*

Baboo Boodh Sein Singh for Appellant.

Mr. R. T. Allan and *Baboo Hurryhur Nath* for Respondents.

Where, after receiving notice of distress, a party brought a suit under Act VIII. of 1869 (B.C.), s. 80, the first Court was held to be in error in thinking it necessary to inquire whether all the steps of the process of distraint were perfectly correct; the simple question to be determined having been whether the demand made by the distrainer was good and valid.

Phear, J.—It is very much to be deplored that there has been so much litigation upon a very simple point as has occurred in this matter. The distress seems to have been effected so far back as March 1871, when the present plaintiff received notice of that distress, and thought it right to bring a suit under section 80 of Act VIII. of 1869 (B. C.). The matter which had to be determined in that suit was a very simple matter indeed, namely, whether or not the demand made by the distrainer was a good and valid demand. The Moonsiff, however, appears to have thought that in this suit he was called upon to inquire whether all the steps in the process of distraint were perfectly correct. He is clearly in error in so thinking.

When the plaintiff had brought the suit, the question was not a question as to the validity of the distraint, but a question as to the amount of the distrainer's demand. The present special appellant was not able to contest the correctness in law of the decision which has been finally arrived at with regard to the amount of the demand. Consequently, there is no reason whatever good on special appeal for disturbing the decision of the Court below.

The appeal must be dismissed with costs.

The 15th December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Zur-i-peshgee Lease—Money-decree—Sale of Mortgaged Property.

Case No. 228 of 1873.

Special Appeal from a decision passed by the Judge of Sarun, dated the 1st October 1872, reversing a decree of the Subordinate Judge of that District, dated the 20th September 1871.

Mussamut Takimonee Kooer (one of the Defendants), *Appellant,*

versus

Mohesh Singh and others (Plaintiffs), *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Baboos Chunder Madhub Ghose, Kali Kishen Sein, and *Judoo Nath Sahoy* for Respondents.

Plaintiffs had lent money to J and B L on a zur-i-peshgee mortgage of a share of certain mouzahs. Subsequently, J and B L sold a portion of their shares to the defendants K and T, who, it was averred, holding the shares ijmalee, ousted plaintiffs from the property.

Against the defendant J plaintiffs made no claim. The first Court dismissed the suit; but the Lower Appellate Court granted plaintiffs a decree upon the property mortgaged, as the zur-i-peshgee had been created long before the sales to defendants. From this T appealed specially:

HELD that the Lower Appellate Court was in error, as the plaintiffs did not in their plaint seek to recover the money from the property which was the subject of the zur-i-peshgee lease, but only a money-decree; and that, even if special appellant were in possession, there was nothing in the lease which would make the property liable to be sold.

Phear, J.—THE Judge of the Lower Appellate Court describes the case as follows:—

"In this case plaintiffs held a zur-i-peshgee "lease, dated the 19th September 1863, exe- "cuted in their favour by Jinispershad and "Baboo Lall, under which they lent them "Rs. 800 upon the mortgage of 1-anna share "in each of the mouzahs Mungurpal, Naoran, "and Mungoopal Moorteza. Subsequently, "Jinispershad and Baboo Lall sold their "shares, or, at all events, a portion of them, to "Mussamut Takimonee Kooer and Ramsahoy "Tewaree, defendants. Plaintiffs now aver "that these two latter defendants holding "the share ijmalee have joined together and "ousted them from the property in Assin "1275 F. Against defendant Jinispershad, "plaintiffs make no claim."

The Judge then states the defence of the different defendants, and that the lower Court dismissed the plaintiff's suit; and he goes on to say: "Plaintiffs now appeal and "urge that, at all events, they were entitled "to a decree upon the property mortgaged, "as their zur-i-peshgee of Rs. 800 is not de- "nied by any one, and it was created long "before the sales to defendants. I think this "contention of plaintiffs is good; they "undoubtedly held possession of a 1-anna "share in each mouzah, and I think they are "entitled to recover their zur-i-peshgee, "Rs. 800, from the property."

As regards the case of the defendant who now appeals to us, we think that the Judge is in error. The plaintiff did not in his plaint seek to recover the money from the property which was the subject of the zur-i-peshgee lease, but merely sought to obtain a money-decree against the two latter sets of defendants. There is perhaps some ground for the assertion that the 3rd defendant, Ramsahoy Tewaree, has made himself liable to pay the 1st defendant's debt to the plaintiffs; but, as far as we can discover, there is no ground whatever for making the special appellant liable to pay this money in any shape. And still less is there any reason for making a decree against her that the money should be paid out of the property. She is not shown to be in possession of the property; and even if she were in possession of the property, we find nothing in the zur-i-peshgee lease which would make that property liable to be sold in order to the realization of the zur-i-peshgee loan.

We fail entirely to discover in this case any ground of suit against the special appellant. It has been argued before us that at most a decree for cost has been passed against the special appellant. That is not quite correct. A decree has been passed against her jointly with all the other defendants—a decree for realization of the money out of the property. That decree certainly ought not to have been passed against her; neither is there any reason why she should have been made liable to bear costs. We are of opinion that the suit, as against her, ought to have been dismissed. We therefore ought to reverse the decision of the Lower Appellate Court as against her, in whose case alone we are concerned at present, because the other defendants have not appealed to this Court. Accordingly we reverse the decision of the Lower Appellate Court and dismiss the plaintiff's suit as against the special appellant, with costs in all Courts.

The 15th December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act XI. of 1859, ss. 10 & 11—Shareholders—Right of Action.

Case No. 327 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Sarun, dated the 7th December 1872, affirming a decision passed by the Subordinate Judge of that District, dated the 4th March 1872.

Nunhoo Shahee and others (Plaintiffs), *Appellants,*

versus

Ram Pershad Narain Singh and others (Defendants), *Respondents.*

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...boos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Appellants.

...C. Gregory and *Baboo Unnoda Pershad Banerjee* for Respondents.

...8-annas shareholder in 4 mouzahs out of 6 which ...stituted an estate was held to be not entitled to sue ...e under either s. 10 or s. 11 of Act XI. of 1859.

Phear, J.—In this case the plaintiff comes ...Court upon a statutable cause of action. ...suit must be dismissed unless he brings ...self within either section 10 or section ...of Act XI. of 1859. Now confessedly he ...not bring himself under section 10, be...e, by his own representation, he is only ...8-annas shareholder in 4 mouzahs out of ...6 which constitute the whole estate. ...is therefore not "a recorded sharer of a ...t estate held in common tenancy'" within ...ion 10. Neither is he "a recorded sharer ...a joint estate, whose share consists of a ...cific portion of the land of the estate," ...use he has only an undivided moiety of 4 ...zahs out of 6. There are other sharers ...must be joined with him before we get ...ce us the entity which will be the sharer ...se share consists of these 4 mouzahs out ...6. If he had been joined with his co...rers of the 4 mouzahs, he might possibly ...ve come before the Court with them as a ...ty entitled to sue under section 11. He ...s not done that; he sues alone, making his ...-sharers defendants together with the other ...rers in the estate, whose shares cover the ...maining two mouzahs.

It need hardly be pointed out that in suits ...framed, the issues which arise between ...e plaintiff and the different defendants are ...ble to be contradictory to one another. ...nd certainly the suit is not one which, in ...r opinion, was contemplated by the Legisla...re when they gave the indulgence to the ...areholders, which is embodied in section ...1 of this Act.

We therefore are of opinion that it is not ...cessary to go into the merits of the judg...nts of the lower Courts, because it ...ppears to us that the plaintiff was not ...titled under the Act to any decision in his ...vour at all.

We therefore think that the decisions of ...e lower Courts must be reversed, and the ...it dismissed with costs in all the Courts.

The 15th December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act VIII. of 1859, ss. 230 & 231—Appeals.

Case No. 247 of 1873.

Miscellaneous Special Appeal from an order passed by the Judge of Gya, dated the 21st May 1873, affirming an order of the Sudder Moonsiff of that District, dated the 22nd May 1872.

Mookundee Misrain (Objector), *Appellant,*

versus

Sheo Lochun Pattuck and others (Decree-holders), *Respondents.*

Baboo Nullit Chunder Sein for Appellant.

Moonshee Mahomed Yusuf for Respondents.

Where an application for the remedy provided in Act VIII. of 1859, s. 230, is refused by a Moonsiff in the exercise of his discretion, no appeal lies against the order of refusal. But where the application is admitted and filed, the opposite side called upon to meet it, and the claim subsequently rejected, the order of rejection is a decision between the parties on the merits of the application within the scope of s. 231, from which an appeal lies to the Judge.

Phear, J.—In this case the petitioner complaining of having been dispossessed of certain property in the course of the proceedings taken to execute a decree between other parties, applied to the Court, which was charged with the execution of that decree, for the remedy which is provided under section 230 of the Civil Procedure Code. The application was made on the 16th December 1871, by a petition which stated the petitioner's case. Upon that application being made, it was the duty of the Moonsiff to examine the applicant; and, according to section 230, "if, after examining the

"applicant, it shall appear to the Court that "there is probable cause for making the "application, the application shall be num- "bered and registered as a suit between the "applicant as plaintiff and the decree-hold- "er as defendant."

We are bound to suppose that the Moonsiff did his duty according to the terms of this section; for, on the same day, the 16th December 1871, he passed the order "that "the application be numbered as a claim- "case, and laid before the Court. The "decree-holder's pleader may, if he thinks "it necessary, file a refutation."

Thus it appears plain that the Moonsiff, in the exercise of his discretion, thought it right to receive the application, and to call upon the other side to answer. Had he, in the proper exercise of his discretion, thought it right to refuse the application, then, probably, there would have been no appeal against his order of refusal. It was so decided so far back as 1864 by a Division Bench of this Court,* and has not, so far as we are aware, since been disputed. A Bombay decision, reported in the 4 Bombay Reports, Appellate Jurisdiction, p. 35, has been quoted to us as an authority in some degree conflicting with the decision of this Court. But, upon reading that report, it appears very plainly that there is no real conflict between the cases. In the Bombay case, the Moonsiff had passed an order under section 229, after admitting the application of the claimant. Although he had, no doubt, committed the irregularity of not putting the number, and registering the claim, still his order was essentially a decision between the parties concerned upon the merits of the claimant's application, and it was therefore a decision within the provisions of section 231 of the Civil Procedure Code. But, whatever might have been the case, had the Moonsiff refused to receive the application under section 230, it must be repeated that, in the present instance, the Moonsiff, whether in exercise of good discretion or not, had, on the 16th December 1871, received the case, and filed it, and called upon the opposite side to meet it. Six months after, on the 22nd May 1872, the Moonsiff entertained the matter again, and then rejected the petitioner's claim. It has been understood by the Lower Appellate Court that this rejection was, in fact, a refusal to receive the application within the first part of section 230. For the reasons already mentioned, it seems to us that that view is erroneous; and the words of the Moonsiff themselves seem to show very plainly that in May the case of the applicant was decided between the parties on the merits, as those merits appeared in the applicant's petition. The Moonsiff says: "Under section 230, Act VIII. of 1859, "the party in possession, when the ouster was "effected, may put in a petition within 30 "days. The petitioner's statement is not "such; under such circumstances the case "cannot be re-instituted under section 230, "and proceeded with. It is therefore ordered "that the prayer of the petitioner be "rejected, and that the case be struck off the "list of pending cases."

So that there is very little doubt that the Moonsiff was dealing with the application after it had been received and admitted, and that his decision was a decision between the parties on the merits of that application within the scope of section 231 of the Civil Procedure Code. We are therefore of opinion that an appeal did lie from the Moonsiff's order to the Judge, and ought to have been entertained upon its merits.

Accordingly we reverse the decision of the Lower Appellate Court, and remand this matter for a re-trial.

The Judge will bear in mind that a petition of this kind, when it has been received and entertained by the Court below, is, in fact, a suit between the parties, and it is a suit of which the cause of action is to be found in the petition of the applicant; and it will therefore be incumbent upon the petitioner, at the trial of this matter before the Judge, to make out the cause of action upon which he made his application to the Moonsiff's Court. That cause of action was necessarily to the effect that he had been in quiet *bonâ-fide* possession of the property which is the subject of the petition, and that while so in possession was turned out by the decree-holder in the course of the proceedings which he instituted and carried on against a third person. Unless the petitioner substantially makes out that statement, the cause of action upon which his application is founded fails, and his application ought to be dismissed. If the Judge finds that there are not materials sufficient before him to enable him to determine the case upon the merits, of course he will deal with it under the provisions of the Civil Procedure Code which are applicable under the circumstances, namely, section 354 and section 355. Costs will abide the event. One gold mohur is allowed for pleader's fees.

* 1 W. R. 139

The 26th November 1873.

Present :

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Amendment of a Decree—Management of an Endowment—Jurisdiction.

Case No. 418 of 1873.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 1st October 1872, affirming a decision of the Subordinate Judge of that District, dated the 29th June 1872.

Bunwaree Chand Thakoor and others (Defendants), *Appellants,*

versus

Mudden Mohun Chuttoraj (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose and Ashootosh Mookerjee for Appellants.

Baboos Gopal Lall Mitter and *Nil Madhub Sen* for Respondent.

Where a decree given by the first Court and affirmed by the Court of appeal is found to need amendment with a view to its meaning being made clear, application should be made for that purpose to the Lower Appellate Court, and not to the High Court.

The Civil Court has no power to bind in perpetuity all the successive owners of an endowment as to the mode in which their property should be managed : and the shebaits of a debutter endowment may make such arrangement for its management as is consistent with their duties, but they cannot make it binding for ever upon all their successors.

Markby, J.—The first point raised for our consideration is whether the decree given by first Court and affirmed by the Court of appeal is wrong, upon the ground that it awards to the plaintiff separate possession of one-third share of the property which, being the property dedicated to an idol, is by its nature impartible. Now it appears that that question was raised in the Lower Appellate Court, and it was there stated by the Judge that really no question arose upon that point, because the plaintiff did not seek, nor did in his opinion the decree of the first Court give separate possession of anything, but only a declaration of the plaintiff's title to take possession of an undivided share in the property. Now I should be disposed to think that legally speaking that construction of the decree was sufficient for any purpose of the defendant; but even supposing that it was not so, and that the decree ought to have been amended, I think it was the business of the defendant to have applied to the Lower Appellate Court to amend the decree and to make its meaning perfectly clear, and not to have come up to this Court with an appeal which appears to us to be wholly unnecessary. But in order to prevent any possible future misconstruction of the decree, we shall now direct it to be amended by drawing it up in this form—that the plaintiff do obtain possession of an undivided share of the properties dedicated for debsheba, and then continuing the decree as it now stands.

But a further objection has been raised that the plaintiff is not even entitled to a decree in that form; that he is not entitled to possession at all; and that, by a decree passed in the year 1829 by the Provincial Court at Calcutta, the parties are bound to place this property in the possession of a gomashta jointly appointed by themselves, receiving only the surplus-proceeds to be divided between them after all the necessary expenses of debsheba have been provided for. Now, no doubt, a decree in that form was passed in a suit between persons through one of whom the plaintiff now claims. But it seems to us that that decree must be looked upon either as an arrangement suggested by the Court for the convenient management of the property at the time, or as an arrangement made amongst the parties themselves for their own convenience; and in either view, as it appears to me, it is not binding upon any persons except the actual parties to that decree. It does not appear to me that the Provincial Court would have had any power to bind in perpetuity all the successive owners of the property as to the

mode in which their property should be managed. This would be so in the case of private property, and I should be disposed to think that it would be even more so in the case of the property of an endowment, which the parties would be bound to use in the most advantageous way they could for the purposes of the endowment: so also if it were an arrangement amongst the parties themselves. Joint owners of a property may make any arrangement they please as to the mode in which their property should be enjoyed by themselves, and the shebaits of a debutter property may make any such arrangement as is consistent with their duties as shebaits; but as far as I am aware, they cannot make an arrangement of this kind binding for ever upon all the successors. Therefore we must put a reasonable construction upon that decree, and we think, upon the whole, that it was intended only as a present arrangement for the management of the property, and not one binding on persons who were not parties to the decree. Under these circumstances, we do not see any reason for having this present decree drawn up in accordance with the decree of 1829.

Then the next point taken is as to the question relating to the properties specified in the 4th issue, namely, the properties Nos. 55 and 68. It has been found by the first Court that the plaintiff is entitled to have these properties included in the decree. The defendants have appealed against that part of the decree, and they have a perfect right in this suit to have this question decided by the Lower Appellate Court. The suit will therefore be remanded for the purpose of trying that point.

There was some question raised as to another property, but the number of it was not given, and we may therefore assume that it is not further pressed. The case will therefore go back to the Judge in order that the appeal may be heard upon the finding of the Moonsiff with regard to the 4th issue; and inasmuch as it now turns out that there was a substantial error in the judgment of the lower Court, it may not be necessary (as at one time I was disposed to think we ought) to make the appellants pay the whole costs of the appeal. Each party will pay his own costs of this appeal. Costs of the future inquiry will abide the ultimate result. In all other respects, except so far as we have indicated in this judgment, the decrees of the lower Courts will stand.

Birch, J.—I concur generally in this judgment.

The 3rd December 1873.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Act VIII. of 1859, ss. 128 & 139—Documentary Evidence—First Hearing.

Case No. 70 of 1873.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 15th July 1872, affirming a decision of the Moonsiff of Kungunniah, dated the 2nd March 1872.

Gour Huree Chowdhry (one of the Defendants), *Appellant,*

versus

Pran Huree Laha (Plaintiff), *Respondent.*

Baboo Huree Mohun Chuckerbutty for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

A party is bound under Act VIII. of 1859, s. 128 to be prepared at all points with his documentary evidence, and, as soon as the Court has framed the issues which it thinks proper to lay down, at once tender (if called upon) the documentary evidence bearing thereon. The words "first hearing in the suit" as defined by s. 139, and do not mean the first hearing on the issue.

Ainslie, J.—This suit is brought by Pran Huree Laha as auction-purchaser of the rights and interests of one Moghun Doss in certain resumed lakhiraj property. It has been determined by the lower Court that the share of Moghun Doss in that property was 4 annas, and on this point there is now no contention. The first contention of the special appellant is that this suit cannot be maintained, inasmuch as the provisions of section 7, Act VIII. of 1859, will apply. Moghun Doss in 1863 sued Gour Huree, the present appellant, and others, to obtain his share of the ancestral estates, and in that suit omitted to claim an interest in the property which forms the subject of the present suit. The terms of section 7 are that every suit shall include the whole of the claim arising out of the cause of action.

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The Judge has found as a fact upon the idence that in 1863 Moghun Doss was in ssession of the property which is now suit, and that therefore in respect of at property he had no cause of action, d as he could not have sued he could not ve omitted to sue. Taking the finding of ct as unassailable, the conclusion seems evitable; but the appellant goes on to attack e finding of fact on the ground that it oceeds upon insufficient material, and that had evidence both documentary and oral ich was wrongly excluded.

The documentary evidence, it is admitted, s not in the plaintiff's hands on the 5th of bruary 1872 when the issues were drawn, d such documentary evidence as he then d, and which had been rejected by the first urt, was admitted by the Judge. But it said that, when a fresh issue is drawn der section 141, the parties have a right begin *de novo*, and that, because it is e first hearing on the issue, therefore it ust be treated as the first hearing in the it. We must confess that we fail altoether to see on what grounds the words of ction 128 are so to be changed; they are ry distinct: "The first hearing *in the suit*," d what that first hearing means is clearly efined by section 139. Then it is said that a matter of discretion the Judge was ound to accept this documentary evidence, d that in refusing it he did not exercise a asonable discretion. If, in the course of y trial, something is brought to light which entirely new, and which has not been disosed on the written statements of either of e parties, no doubt the Court framing a esh issue under section 141 would give the rties time to produce evidence in respect that new matter; but in this case there as no new matter at all. What is pressed w was suggested even in the written statent of the defendant, and he was bound, nder section 128, to be prepared at all points with his documentary evidence. As soon as the Court had framed the issue which it thought proper to lay down, he would be required, if called upon, at once to tender e documentary evidence bearing upon em. It is quite clear that this issue might ave been framed on the 5th of February, d therefore any documentary evidence, not the defendant's hands on that day, was ot properly before the Court; and we cannot say that the Judge did not exercise a asonable discretion in insisting that the les of procedure should be strictly followed.

Then as to the oral evidence, it appears that the Court was in no way to blame for the failure of the defendant to produce all the witnesses named by him. All the steps suggested by him were taken, and it is not suggested that anything was left undone; and the fact that, at the last moment, when the case was either fixed for hearing on the following day or actually before the Court (we do not know, and it is not very material which it was), the defendant came in with a petition for further time, does not give him a right to an adjournment. It is absolutely necessary that the Courts should be somewhat strict in these matters. The habit of applying for postponements on almost any ground, and of doing anything and everything that will put off the decision of the case, is one which is unfortunately so universal, that we think we should be wrong in saying that the Court in this instance had exercised a wrong discretion. It does not appear to us that the defendant, appellant, has in any way been deprived of his rights by the course which has been adopted in the Court below.

Under these circumstances, we think that the appeal ought to be dismissed with costs.

The 3rd December 1873.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Act VIII. of 1859, s. 271—Construction.

Case No. 228 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 9th April 1873, reversing an order of the Moonsiff of Pachpokurreea, dated the 28th June 1872.

Joy Chunder Ghose (Decree-holder), *Appellant,*

versus

Ram Narain Poddar and another (Judgment-debtors), *Respondents.*

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Appellant.

Moonshee Serajul Islam for Respondents.

Following a previous decision, it was held that the words "subject to a mortgage" in Act VIII. of 1859, s. 271, must be taken to mean "sold with notice of the mortgage," and do not refer merely to properties the

subject of an undisclosed mortgage, which are sold in execution.

Ainslie, J.—THE question which arises in this appeal appears to be disposed of by the decision of the present Chief Justice reported in Volume XIV., Weekly Reporter, page 209. It is there clearly laid down that the words "subject to a mortgage," in s. 271 of the Code of Civil Procedure, must be taken to mean "sold with notice of the mortgage," and do not refer merely to properties which being the subject of an undisclosed mortgage happen to be sold in execution. There appears to be no ground whatever in this case on which the Judge was entitled to accept, as he has done, the statement made before him to the effect that in this instance the property did fetch a much smaller price in consequence of the lien on it; for there was no evidence on which the Judge could find that the purchaser, in the first execution-suit, took with notice.

We should have had to remand the case to the Lower Appellate Court for a finding of fact upon this point, but, as nothing has been pointed out to us on which such a conclusion could be arrived at, it is unnecessary to proceed further. The judgment of the Lower Appellate Court must be reversed, the decision of the Moonsiff restored, and this appeal decreed with costs. Pleader's fees two gold mohurs.

The 5th December 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Evidence of Party to Suit.

Case No. 441 of 1873.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 8th November 1872, affirming a decision of the Moonsiff of Oundah, dated the 31st August 1872.

Gopal Chunder Hazrah (Defendant), *Appellant*,

versus

Mohesh Chunder Banerjee and others (Plaintiffs), *Respondents*.

Baboo Nil Madhub Sen for Appellant.

Baboo Bungshee Dhur Sen for Respondents.

* Before it makes an order under Act VII. of 1859, s. 162, compelling the attendance of a party to the suit, the Court must be satisfied that his evidence be material.

Couch, C.J.—IT was objected in special appeal that there has been an er in the procedure of the lower Courts in compelling the attendance of the plainti and in not issuing a proclamation requiri the attendance of the plaintiffs' manager.

As to the compelling the attendance the plaintiffs the Court (by section 162 Act VIII. of 1859) may, upon an applicati being made to it, make an order requiri the attendance of a party to the suit; that section directs that the party requires such an order shall show to satisfaction of the Court sufficient groun in support of his application. He m satisfy the Court, at least, that the party the suit whose attendance is required probably give evidence which would material to his case. Here there is nothi to show that the plaintiffs could have giv any evidence in support of the defendan case. It does not appear that the plainti had any knowledge themselves of the matte which were in issue, and in the absence that, the lower Courts were justified declining to compel the attendance of t plaintiffs.

Then as to the not issuing the proclamati requiring the attendance of the manager— that is to be done upon proof that t evidence of the witness is material, an that he absconds or keeps out of the wa for the purpose of avoiding the service the summons. There is nothing in evidenc to show that the manager could have giv material evidence. There is a petition co taining an allegation that the gomashta wa a false witness, and ought not to be believed and that the manager may have given som evidence to prove that. The substance the petition is that the manager, if he ha been called, would have shown that th gomashta was a false witness. It is no supported by any evidence, not even supporte by the deposition of the person who presente it. We think the Court was not boun under those circumstances to issue the pro clamation. And also, as to the absconding or keeping out of the way, the Moonsi appears to have considered that the person whom it was proposed to examine to prove that the manager was keeping out of the way, not being named by the peon as being present when he went to serve the summons, could not know anything about it. Probably this is right, though we are inclined to think

hat he was somewhat hasty, and that it would have been better if he had examined these witnesses. It was not enough for the defendant to show that the manager was keeping out of the way. He had to give some proof to the Court that his evidence was material to his case, which he did not do.

The appeal must be dismissed with costs.

The 9th December 1873.

Present:

The Hon'ble F. A. Glover, *Judge.*

Old Documents—Evidence—Act I. of 1872, s. 90.

Case No. 1031 of 1873.

Special Appeal from a decision passed by the Officiating Subordinate Judge of East Burdwan, dated the 14th April 1873, reversing a decision of the Sudder Moonsiff of that District, dated the 28th December 1872.

Ekcowree Singh Roy and others (Plaintiffs), *Appellants,*

versus

Kylash Chunder Mookerjee (Defendant), *Respondent.*

Baboos Hem Chunder Banerjee and *Rash Beharee Ghose* for Appellants.

Baboos Tarucknath Sen and *Rajendro Missree* for Respondent.

Where a document purported to be 45 years old, and a mohurrir swore to its having been in his custody as keeper of plaintiff's records for the time of his service, the evidence was *held* to show (if credible) that the document had come from proper custody within the meaning of Act I. of 1872, section 90, and to require no direct evidence of its genuineness.

THIS was a suit to recover possession of a strip of land 23 cubits by 17, which had been granted by the plaintiff to the defendant's predecessor, one Nuffur Chand Ghose, under a kubooleut dated Jyet 29th, 1235. The plaintiff states that the condition of the lease was that the lessee should give up the land whenever the plaintiff wished to have it for building purposes.

The defendant No. 7 (the other defendants, heirs of Nuffur Chand Ghose, not opposing the plaintiff's claim), a purchaser, alleges that the lease to Nuffur Chand Ghose was an hereditary mokurruree one, and that, under any circumstances, he could not be ousted, his predecessors having been for 40 years in possession, and he himself having built a house on the land. He denied the genuineness of the kubooleut filed by the plaintiff.

The first Court found that the kubooleut had been really given by Nuffur Chand, and that by its terms the defendant, as representative of the original lessee, was bound to vacate the land. Defendant had failed to prove the alleged mokurruree pottah.

The Subordinate Judge reversed this decision, holding that the kubooleut was not proved; and that if it were, the plaintiff could not re-enter, because he had not declared his intention of building on the land, which, according to the terms of the kubooleut, was the only ground for his being able to take back his property.

It is urged in special appeal that the Subordinate Judge has given no weight to the fact that the kubooleut is more than 30 years old, and has been produced from proper custody, and that, under any circumstances, the plaintiff, as the undoubted owner of the land, is entitled to recover it, unless the defendant can make out a title to retain it.

On the first point, the Subordinate Judge's finding seems to be incomplete, and not in accordance with the law. Section 90 of Act I. of 1872 (the Evidence Act) provides that where a document is or purports to be more than 30 years old, if it be produced from what the Court considers to be proper custody, it may be presumed that it was executed and attested by the parties whose signatures it bears. Now, this kubooleut is dated in 1235, and therefore purports to be about 45 years old, and a witness, a mohurrir of the plaintiff's, swears to its having been in his custody as keeper of the plaintiff's records for the time of his service, namely, for the last 15 years. If this man's evidence is credible, it shows that the deed has come from proper custody, namely, from the custody of the plaintiff's servant, who was entrusted with the keeping of the zemindaree papers. There was no necessity for requiring direct evidence of the genuineness of the kubooleut.

Then, as to the second point, I do not think that the mere fact of the plaintiff's not stating in his plaint his intention to build on the land he seeks to recover, is sufficient to vitiate his claim. He is the undoubted owner of the property, and it is for the defendant to show that he has some right which the owner cannot interfere with. The plaintiff may intend to build notwithstanding his omission to say so in the plaint, or to demand the demolition of the defendant's house. It was for the defendant, I think, to prove the mourosee and mokurruree pottah which he alleged his vendors to have received from the plaintiff; and in this he failed. If the

plaintiff fails to prove his agreement with the defendant, as shown by the kubooleut, it may perhaps be a question whether he can, notwithstanding his rights as zemindar, eject a party who has been for so many years in enjoyment of the land, although that land was used neither for agricultural nor horticultural purposes. And as this is a point now before the Full Bench, I should have postponed a decision in this case until a Full Court had settled what was to be the effect of Act V. of 1867 (B. C.) on the Rent Law, as the result might have been a right of occupancy by the defendant in the land now sought to be recovered; but as the plaintiff gave evidence as to the custody of the kubooleut—evidence which authorized the Subordinate Judge to presume the authenticity of the document, if it thought proper to do so—the Subordinate Judge ought, I think, to reconsider the plaintiff's case in the light of section 90 of the Evidence Act, and decide as to the genuineness or otherwise of the kubooleut, according as he may be satisfied or not as to the documents being produced from proper custody.

Costs will follow the result.

The 10th December 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. B. Kemp, Louis S. Jackson, F. A. Glover, and C. Pontifex, *Judges.*

Arrears of Rent—Suit by Co-sharer.

Case No. 1799 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 9th September 1872, affirming a decision of the Moonsiff of Nubeegunge, dated the 28th June 1872.

Doorga Churn Surmah (one of the Defendants), *Appellant,*

versus

Jampa Dossee (Plaintiff), *Respondent.*

Baboos Kalee Mohun Doss and *Debendro Narain Bose* for Appellant.

Baboo Bharut Chunder Dutt for Respondent.

A suit by a co-sharer for arrears of rent which she had heretofore received in proportion to her share, but which she alleged now to be withheld by the ryot in collusion with the other co-sharers, who were also made defendants, was held to be properly maintainable.

This case was referred to the Full Bench on the 4th September 1873 by Couch, C. J., and Birch, J., with the following remarks:—

Couch, C.J.—The plaintiff in this suit is one of three co-sharers in an eight-annas share of rent payable by a ryot Doorga Churn Surmah, and she brought a suit against him and the other co-sharers for her share of the rent, alleging that they were colluding with him. Doorga Churn Surmah's defence was that he never paid any rent to the plaintiff, and he had been paying rents to the agents of Gour Chand and Lal Chand, the other defendants. Gour Chand Doss contended that the plaintiff did not live with him in commensality, and she did not receive any rent from the ryot. The Moonsiff decreed that the defendant, Doorga Churn, should pay to the plaintiff the rents claimed by her with costs.

This was confirmed by the Subordinate Judge on an appeal by Doorga Churn Surmah who has brought this special appeal.

It was objected for the appellant that the suit could not be maintained, and the following cases were cited: 17 Weekly Reporter 408; 17 Weekly Reporter 414; 15 Weekly Reporter 396.

On the other side were quoted 10 Weekly Reporter 108; 18 Weekly Reporter 376; 12 Weekly Reporter 30; 3 Bengal Law Reports 230; S. C., 16 Weekly Reporter 281; Weekly Reporter, January to July 1864, Act X. Rul., 63; 1 Weekly Reporter 253; 5 Weekly Reporter, Act X. Rul., 68.

The objection was not taken in the first Court, but this seems to be immaterial as the other co-sharers were made defendants, and the plaintiff could not compel them to join her as plaintiffs.

The question which arises is whether the suit can be maintained, and as we differ from the decisions that it cannot be maintained, we refer this appeal for the final decision of a Full Bench.

The judgments of the Full Bench were delivered as follows:—

Kemp, J.—The question which has been referred to the Full Bench in this case is whether the present suit can be maintained.

I am of opinion that the present suit can be maintained. The plaintiff sues for rent of the years 1277 and 1278, alleging that she is jointly in possession of a share in the estate,

ad has hitherto received the rents in proportion to her share. She has made her co-sharers defendants in the suit.

The defendant No. 1, the ryot, altogether repudiated the plaintiff's title, and alleged that he had paid the whole of the rents for the years 1277 and 1278 to another party, namely, the defendant No. 2. The defendant No. 2, a co-sharer, also disputed the plaintiff's title, and stated that the plaintiff never lived in commensality with him, and that she has never received any rent from the defendant No. 1, the ryot.

Both Courts have found on the evidence that the plaintiff has all along received rent up to the date preceding that of the institution of the suit. They have also found that the defendant, the ryot, was called upon by the plaintiff to pay rent, and that the defendant No. 1, the ryot, knowing that the surburakar to whom he had been paying the rent had been discharged by the plaintiff, withheld payment of the rent of plaintiff's share.

Under these circumstances I am of opinion, upon the findings of fact of the two lower Courts, and inasmuch as the co-sharers have been made defendants, that the suit is maintainable.

Jackson, J.—I am also of opinion that the present suit is one which the plaintiff was entitled to maintain. There is a class of suits somewhat resembling the present, in which I have, on several occasions, expressed an opinion that the plaintiff is not entitled to sue separately, that is to say, where several persons being jointly entitled to receive rent from a ryot, and having been accustomed to receive such rent jointly, afterwards one or more of them brought separate suits against such ryot in respect of their separate shares. In those cases it was held that the nature of the contract or holding being such that the ryot was accustomed to pay his rent in one sum to the joint agent of the owners, he ought not to be harassed by being sued in several suits in respect of portions of the same claim. Here the case is different. The owners, it is true, have been accustomed to collect the rents jointly (at least I understand that to be the finding) and by a joint agent; but the parties who have been made defendants along with the ryot had subsequently taken from the ryot, with his consent, their own separate shares of the rents, and the suit which the plaintiff brought was in effect a suit to recover an arrear, which arrear corresponded with her own share of the rent which the ryot had vexatiously and collusively refused to pay. That amount still remained unpaid, and the plaintiff being entitled to it, it seems to me that she was justified in bringing this suit, making at the same time the other co-sharers parties as defendants. In point of fact, the conduct of the defendant was not that of a ryot who complained of being subjected to several suits in respect of one claim; it was that of a ryot entering into a collusion with two out of three co-sharers for the purpose of depriving the third. Under these circumstances, it is difficult to see what other course was left to the plaintiff than to sue these parties, in order to recover that which was justly due to her and to her alone. I therefore think that the suit was properly maintainable.

Glover, J.—I concur in thinking that, under the circumstances of the case, the suit was maintainable, and I do so generally for the reasons given by Justices Kemp and Jackson.

Pontifex, J.—Under the circumstances of this case, I think there is no doubt whatever that this suit is properly maintainable; and, as at present advised, I am not prepared to say, when a ryot is holding under co-sharers but not under a written contract, that one of the co-sharers cannot sue separately for his share of the rent if he makes the other co-sharers defendants.

Couch, C.J.—I concur in the opinion that has been given that the present suit is maintainable. That was my opinion when the question was referred to the Full Bench. The appeal will be dismissed with costs.

The 12th December 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Plaints—Cause of Action—Limitation.

*Application for review of the judgment passed by the Hon'ble J. B. Phear and W. Ainslie, in Regular Appeal No. 144 of 1872, dated 13th March 1873.**

R. P. Brooke, *Petitioner,*

versus

T. M. Gibbon, *Opposite Party.*

Mr. G. H. P. Evans for Petitioner.

The Advocate-General and *Moonshee Mahomed Yusuf* for Opposite Party.

* 19 W. R. 244.

A plaintiff is bound by the Code of Civil Procedure to show on the face of the plaint that his cause of action accrued within the period of limitation.

Where an assignment to himself is a material part of a plaintiff's cause of action, he ought to allege the fact in his plaint.

Phear, J.—In this case the Subordinate Judge dismissed the suit without trying the merits, or in any way going into the facts of the case, on the ground that it appeared on the face of the plaint itself that the suit was barred by the statute of limitation.

On appeal to this Court, we were of opinion that the Subordinate Judge was substantially right. It appeared to us that the cause of action was, in reality, a breach of contract, which breach was expressly stated by the plaint itself to have occurred more than three years before suit, and we thought that therefore the suit was barred by the provisions of section 1 of Act XIV. of 1859, clauses 9 and 10. In this application for a review of judgment, it is argued that, assuming that the view which was taken by this Court as to the nature of the cause of action upon which the plaintiff sues was a correct view, still the suit is not barred, because the plaintiff could prove by evidence, if he was allowed to adduce evidence, that the contract, the breach of which was complained of, was a registered lease, and that consequently the plaintiff had six years within which to sue, and not merely three years. And a certain registered pottah, which is filed among the papers of the case, was referred to as the contract upon which the plaintiff would rely for this purpose. Now the answer to this argument seems to be, in the first place, that the plaintiff has not stated these facts in his plaint, while he is bound by the Civil Procedure Code to show, on the face of the plaint itself, that he is within time. And, secondly, assuming the contract to have been a registered contract, and that the plaintiff would therefore have six years within which to complain of the breach, still it seems to us quite clear that the breach laid in the plaint occurred more than six years before the suit. The term was a period of seven years, commencing with the year 1272; the breach was non-delivery of a certain portion of the property contracted to be leased, and this non-delivery must have occurred (so to speak) at the very commencement of the term, because the damages which are sought to be recovered here are in respect of a portion of the rent which was paid as due from the very beginning of the term. Unless the breach complained of was non-fulfilment of the lessor's obligation as early as the beginning of t year 1272, the plaintiff could not cla the rent or any portion of the rent of 12 as having been the loss occasioned to him the non-delivery; and the suit was brought until six years and a half, or, least, upwards of six years, had elapsed fr the commencement of the term.

But further than this, it appears to that the plaintiff has shown no way which he could avail himself of this par cular registered pottah. It is a pott granted not to him, but to one Mr. Moore, person who, in the first instance, was made party defendant in the suit. He has n alleged in his plaint that he obtained assignment of this lease from Mr. Moore, an assignment of any causes of action whi had accrued to Mr. Moore upon this lea In order to base his cause of suit upon t footing of this registered lease, it would necessary for him to prove some such assig ment as this; and of course, to enable him prove that assignment at the trial, in much as it was a material part of his ca of action, he ought to have alleged the f in his plaint. No such allegation appe there; there is nothing that we could by a indulgence to him construe into an allegati of that kind. We find it difficult to unde stand how, indeed, he could prove such assignment, excepting by means of so transaction of which the evidence its ought to be registered as well as the origin contract. And it is not even stated to us argument that any such registered assig ment was executed.

Finally, we will add that we doubt ve much whether any cause of action is di closed in the plaint. The plaint says th the mouzah in question, "with other mo "zahs, was farmed out by the manager "the Bettea Raj to the Roopoleah Facto "from 1272 to 1278 Fuslee. The facto "has invariably paid rent of the said mouz "up to 1273 to the manager's office "taking receipts. But the mouzah "question had, from a previous time, been "the farm of the defendant No. 2, and co "sequently the factory could not get posse "sion of it." It is possible that this alleg tion may afford some foundation for action against the defendant No. 2. B the defendant No. 2, as we understa the record, is not a person against who the plaintiff intended to proceed. He designated as *pro-formâ* defendant. A as the defendant No. 1 is alleged to the manager of the Bettia Raj, who is rea

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defendant in the case, it does not appear the face of the plaint that the fact of the intiff not being able to get the mouzah in estion from the defendant No. 2, forms any use of action against the defendant No. 1.

On the whole, after giving the best conleration that we have been able to give to e application for review, we think that the plication fails, and we see no good reason r altering the judgment which we have ready passed. The rule will, therefore, be scharged with costs.

The 16th December 1873.

Present:

he Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Widow—Digging a Tank—Legal Necessity.

Case No. 391 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 26th September 1872, reversing a decision of the Moonsiff of Hathazaree, dated the 27th July 1872.

Runjeet Ram Koolal (Defendant), *Appellant,*

versus

Mahomed Waris and others (Plaintiffs), *Respondents.*

Baboo Aukhil Chunder Sen for Appellant.

Baboo Grish Chunder Ghose for Respondents.

The digging of a tank, though a meritorious act and a great convenience to the public, is not a legal necessity for which a widow can alienate property left to her for life only.

Glover, J.—We see no ground for interfering with the lower Court's order in this case. It has been found as a fact that the sale by the widow to Ram Doss, from whom the plaintiff took the land in mortgage, was consented to by the next heir, Ram Soonder. No doubt the first Court has found on the evidence that that consent was not proved; but there can be no doubt, from the judgment of the Subordinate Judge, that he considered that that consent was really and truly given. It is said that that consent only raised a *primâ-facie* case in favour of the plaintiff.

We think that this is not so. Ram Soonder was the only person entitled to this property after the widow; he was the next heir, and it depended upon him whether the widow could alienate the land or not, and his consent would be, under these circumstances, the strongest possible evidence that the transfer was an honest one, and made with the consent of all the parties interested.

The present special appellant comes in saying that he inherited from Runjeet Ram, the son of Ram Soonder, and it does not lie in his mouth to say that the sale to Ram Doss was not made with the consent of the then reversionary heir. The Subordinate Judge is wrong, no doubt, in saying that the digging of a tank is a sufficient legal necessity for a widow to alienate. The digging of a tank would be a meritorious act and a great convenience to the public, but it would not be a legal necessity for which a widow could make away with property which was only left to her for her life.

The special appeal is, therefore, dismissed with costs.

The 16th December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Zur-i-peshgee Lease — Default—Cancellation—Ejectment.

Case No. 304 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 21st September 1872, modifying a decision of the Sudder Moonsiff of that District, dated the 5th June 1872.

Lullit Paurey (Plaintiff), *Appellant,*

versus

Rajgeer Sahoo (Defendant), *Respondent.*

Mr. M. L. Sandel for Appellant.

Baboo Boodh Sen Singh for Respondent.

Where a lessee made default in payment of rent and the lessor under the terms of a zur-i-peshgee lease had the right to take *seer* possession, but nevertheless sued to have the lease cancelled without praying to have the defendant ejected, his omission to sue for ejectment was held not to deprive him of the right to have the lease cancelled, even though he had in his hand zur-i-peshgee money of the defendant which exceeded the rent due and decreed, but which was not payable until the last year of the lease.

Phear, J.—Both the Courts below have found as a fact that the defendant was bound to pay to the plaintiff certain arrears of rent;

that, in other words, he has made default in the payment of his rent ; and that being so, it seems to be very clear on the terms of the lease that the plaintiff has a right to determine the lease. He has a right to take *seer* possession, and for that purpose he has a right to put an end to the lease. He has asked in this suit to have the lease cancelled ; and it is made a matter of complaint against him that he has not further asked to have the defendant ejected. His omitting to ask that the defendant be ejected does not deprive him of the right to have the lease cancelled. It appears to us, therefore, that the Subordinate Judge was wrong in not giving a decree in favour of the plaintiff to the effect that the lease be cancelled. He seems to have thought that inasmuch as the plaintiff had in his hand money of the defendant which considerably exceeded the amount of the arrears decreed, therefore it was useless to decree the cancelment of the lease, because under section 52, Act VIII. of 1869 (B.C.), the payment of arrears would be effected at once by the application of the deposit money to this object, and the cancelment would be simply of no effect. But that is not so, because the plaintiff is entitled by the terms of the lease to hold the whole of the zur-i-peshgee money in his hand until the last year, and therefore, until the last year, the defendant is bound to pay the current amount of rent which accrues due, quite irrespective of the money which is in the plaintiff's hands.

We are, therefore, of opinion that the decree of the Lower Appellate Court must be varied, and instead of it, it must be decreed that the defendant do pay to the plaintiff the arrears of rent found due, with costs and interest thereon at 6 per cent. per annum. And further, it must be decreed, and directed that the lease be cancelled.

But we will add, though it is unnecessary to make this a part of the Court's order, that in the event of the defendant paying the arrears of rent within 15 days of the decree, and so saving the lease under the provisions of section 52, the deposit money will of course remain in the hands of the plaintiff, and be liable to be applied in the last year of the term, at the request of the defendant, to the payment of the rent. But in the event of the defendant not paying the arrears within 15 days, that is, in the event of the decree for cancelment taking effect, then inasmuch as the amount of money belonging to the defendant which is in the hands of the plaintiff exceeds the amount decreed to be paid by the defendant to the plaintiff, the plaintiff will have to pay over the difference to the defendant, or will be liable to be sued for it.

The appellant will have costs in all the Courts.

The 17th December 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Assault—Defamation—Damages.

Case No. 497 of 1873.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 2nd December 1872, reversing a decision of the Moonsiff of Sasseeram, dated the 30th July 1872.

Mohendro Nath Ghose (Plaintiff), *Appellant*

versus

Mr. Morton (Defendant), *Respondent.*

Baboo Anund Chunder Ghosal for Appellant.

No one for Respondent.

An action for damages on account of threatened assault and defamation of character, ought not to be dismissed because of the absence of the plaintiff; but if such absence renders it difficult for the Court to assess the damages, the Court is justified in giving less damages than it might otherwise give.

Phear, J.—We think on the state of facts which has been found by the Lower Appellate Court that the plaintiff was in law entitled to the award of some damages. The Judge has found that the defendant committed against the plaintiff two gross and unprovoked wrongs. He threatened to assault him without any cause or justification; and he also publicly defamed his character. For either of these wrongs, and therefore for both of them, the plaintiff is entitled to obtain damages from the defendant. We therefore think that the Lower Appellate Court was wrong in dismissing the plaintiff's suit. The Court ought to have proceeded upon this finding of fact to assess the amount of damages which the defendant should pay to the plaintiff. At the same time, no doubt, if the absence of the plaintiff's testimony placed the Court in difficulty with regard to the assessment of damages, the Court would have been quite justified in giving less damages on that account than it otherwise might have given.

n a case of this kind, the plaintiff was ost bound to come into Court to establish wrong that he complained of, and also to e the Court the best opportunity of termining and judging the extent of damage ich he had incurred. His absence, how-r, ought not of necessity to debar him m all remedy.

We reverse the decision of the Lower pellate Court, and remand the case in order t the Judge may assess the damages due m the defendant to the plaintiff, having gard to the circumstances under which the ong was committed and the social status the plaintiff.

The defendant must pay the plaintiff's sts in this Court, which we assess at enty-five rupees.

The 17th December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Ejectment—Added Defendants—Issues.

Case No. 429 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 27th November 1872, reversing a decree of the Moonsiff of that District, dated the 31st July 1872.

Kartick Nath Parray and others (Plaintiffs), *Appellants,*

versus

Chummun Roy and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellants.

Baboos Gopeenath Mookerjee and *Luckhee Churn Bose* for Respondents.

In a suit for ejectment against C, certain parties were added to the record who could not possibly be affected by any decision against C. The Lower Appellate Court arrived at the conclusion that C was not in possession, but that the added defendants were his tenants:

HELD that the single question was whether C was wrongly keeping plaintiffs out of possession, and that there had not been a fair and complete trial as between plaintiffs and the added defendants as to any question of tenancy. The suit was accordingly dismissed without prejudice to any other suit which plaintiffs might bring against the latter.

Phear, J.—THIS is one of those cases, unfortunately far too numerous, in which the first Court has done very much to embarrass the parties, and to produce complexity in the matter which is to be tried, by adding parties defendant in the suit without having good cause for so doing.

The plaintiffs brought this suit seeking to eject one Chummun Roy from the possession of certain land. The persons who were added to the record by the first Court could not possibly be affected by the result of any decision which could be passed in this suit against Chummun Roy. The single question which had to be tried was whether Chummun Roy was wrongly keeping the plaintiffs out of possession of their land; if he was, the decree would go against him; if he was not, the suit would be dismissed. In either case, the persons whom the first Court had thought right to put upon the record would have been altogether unaffected by the decree. The Lower Appellate Court has arrived at the conclusion that Chummun Roy is not in possession of the lands for which the plaintiffs sue. It has further arrived at the conclusion that the added defendants are in possession of the lands as tenants of the plaintiffs. Now, by the nature of the suit, there has clearly not been a fair and complete trial as between the plaintiffs and the added defendants of any question as to tenancy. The plaintiffs did not seek to get a decree against these added defendants; they sought to recover possession of the land from Chummun Roy solely. Under these circumstances it appears to us plain that the suit ought to have been dismissed—dismissed as against Chummun Roy, because the plaintiffs had failed to establish a cause of suit against him; and as against the other parties, because they never ought to have been put upon the record, and there has not been in truth any matter really tried between the plaintiffs and those added parties. In saying this, we think that, as regards these added parties, the dismissal of the suit should be without prejudice to any other suit which the plaintiffs may be advised to bring against them with regard to possession of the land.

We dismiss the appeal, simply varying the order of the Lower Appellate Court by saying that the dismissal of the suit must be without prejudice to any suit which the plaintiffs may be advised to bring against the added defendants.

We think that each party must bear his own costs in this Court.

The 17th December 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act XIV. of 1859, s. 15—Possessory Action—Onus Probandi.

Case No. 494 of 1873.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 5th December 1872, reversing a decision of the Moonsiff of Maldah, dated the 30th April 1872.

Jhoomuck Lall Shaha (Plaintiff), *Appellant,*

versus

James Burrell (Defendant), *Respondent.*

Baboo Rajendro Nath Bose for Appellant.

The Advocate-General for Respondent.

A party failing in a possessory action under Act XIV. of 1859, s. 15, is bound to prove his title, even though he may have been in possession for three or four years previously.

Glover, J.—THERE is no ground for this special appeal. The plaintiff having failed in a possessory action under section 15, Act XIV. of 1859, was of course bound to prove his title which he alleges he derived by gift from Nowrungo Monee, who was one of the purchasers at the auction-sale. The Judge has found distinctly on this part of the case that the plaintiff has not proved the gift either by documentary or by oral evidence. The special appellant contends that as he was in possession for three or four years, the defendant was bound to prove his title. This is clearly a mistake; the position in which the plaintiff is placed by losing the possessory action throws upon him the onus of proving his title. The special appeal will be dismissed with costs.

The 18th December 1873.

Present:

The Hon'ble W. Ainslie and G. G. Mo

Judges.

Special Appeal—Remand—Jurisdiction of H Court.

Case No. 261 of 1873.

Special Appeal from a decision passed the Judge of Shahabad, dated the September 1872, modifying a decision the Subordinate Judge of that Distr dated the 10th July 1872.

Lalla Ram Lall and another (Plaintiff), *Appellant,*

versus

Mohurput Roy and others (Defendants), *Respondents.*

Mr. C. Gregory for Appellant.

Moonshee Mahomed Yusuf for Respondents.

Being debarred, in special appeal, from entering int the merits of a case in which the lower Courts ha erred as to the only question of fact they had to try the High Court felt itself obliged to remand the cas for a proper finding.

Ainslie, J.—THE suit in this case appear to have been misunderstood by both the Courts below. The only question they had to try was whether Dwarka Singh professe

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pledge to the Collector, on the 30th nuary 1865, a share larger than that which actually held on that date. If he did so, ere can be no doubt that, on the sale which llowed under that security bond, the entire terest that he might hold in Mouzah Moor assed to the purchaser. This view of the se was pressed upon the Lower Appellate ourt, but unfortunately the Judge seems to ave thought that it was a variation from e plaint.

The plaint has been read to us, and we ink that it is perfectly clear and distinct; fact, it seems to be admitted by both sides at there was originally an estate called louzah Moor; that there was a partition ffected of this estate, under which a $3\frac{1}{2}$-anna hare became a separate estate under a eparate number on the towjee; and that ere has been a second partition of that $3\frac{1}{2}$-nna share, by which 11 annas 1 pie and a raction was assigned to other parties, and annas 10 pie and a fraction became the eparate property of Dwarka Singh and ertain co-sharers with whom we are not oncerned.

Then, again, it seems to be admitted by oth parties that Dwarka Singh's interest n this estate, which was carved out by the econd butwara, and which is numbered on he record 4306, it is admitted that Dwarka ingh's interest in this was only 5 annas. ut it does not at all follow that this 5 annas as all that he professed to pledge to the ollector by the bond of the 30th January. f we were at liberty to decide on the facts, e should have had no difficulty in giving udgment in this case; but in special appeal e are debarred from entering into the merits, nd we are obliged to send this case down to he Judge of the Lower Appellate Court in rder that a proper finding should be come o on the point indicated above, namely, whether Dwarka Singh, by the security-bond of the 30th January 1865, professed to deal with any larger property than what was assigned to him subsequently in the second butwara, or, in other words, that there may be no mistake whether, on the 30th January 1865, he professed to pledge a 4-annas share of mehal No. 3651.

If it is found that Dwarka Singh pledged not only all that he rightly was entitled to, but something more, it is quite clear that he could not be free, at a subsequent date, to deal with any part of the property belonging to him.

The case is remanded to the Lower Appellate Court. Costs to follow the result.

The 18th December 1873.

Present :

The Hon'ble J. B. Phear, *Judge.*

Act VIII. (B.C.) of 1869, ss. 23 & 27—Construction—Limitation.

Case No. 1561 of 1873.

Special Appeal from a decision passed by the Additional Judge of Backergunge, dated the 2nd May 1873, affirming a decision of the Moonsiff of Madareepore, dated the 19th August 1872.

Nistarinee (Plaintiff), *Appellant,*

versus

Kalee Pershad Doss Chowdhry and others (Defendants), *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Bhyrub Chunder Banerjee* for Appellant.

Baboo Grija Sunkur Mozoomdar for Respondents.

Following a Full Bench decision (7 W. R., p. 186) as to the proper interpretation of Act X. of 1859, s. 23, it was *held* that the same words in Act VIII. (B.C.) of 1869, s. 27, described only possessory actions against persons entitled to receive rent, and not suits setting out title, and seeking to have right declared and possession given in pursuance thereof, and that consequently the limitation prescribed by s. 27 applies only to simple cases of possessory action.

It is not disputed by the learned pleader who has appeared on behalf of the respondent, that the words "all suits to "recover the occupancy of any land, farm, or "tenure from which a ryot, farmer, or tenant "has been illegally ejected by the person "entitled to receive rent for the same," which appear in section 27 of Act VIII. of 1869 of the Bengal Code, bear the same meaning as the same words did bear or were interpreted to bear in section 23 of Act X. of 1859; and those words were interpreted by a Full Bench decision, which is reported in 7 Weekly Reporter, page 186, to describe only possessory actions brought against persons entitled to receive rent, and not to describe or include suits in which the plaintiff sets out his title, and seeks to have his right declared, and possession given him in pursuance of that title; that is to say, suits in which no question arises between the parties, excepting the question whether the plaintiff, who, at the time of ejectment, was admittedly

the tenant of the defendant, was legally or illegally ejected by the defendant when the defendant turned him out. Under Act X. of 1859, if any other question than this arose between the parties in the Collector's Court, the Collector had no power to try it. This being so, it is plain that the limitation of one year, which is prescribed by section 27, Act VIII. of 1869 (B.C.), applies only to simple cases of possessory action which fall within the definition of the Full Bench just referred to. Now, in the present case, the plaintiff set out his title, stated that he had been in possession by virtue of that title, and that, while he was in possession, he had been illegally ousted by the defendant. The defendant not only denied the illegal ousting, but he, as it seems, denied the allegations of the plaintiff's title; and in the Court of first instance issues of title were distinctly raised. This being the case, it seems to me quite plain that the present suit is not a suit belonging to the class which is defined in the words I have quoted from section 27, Act VIII. of 1869 (B.C.), and consequently that it is not barred by the limitation of one year which is prescribed in that section. In my opinion the Judge's decision is founded on an erroneous view of the law of limitation, and I think therefore the decree of the Lower Appellate Court must be reversed, and the case remanded for trial upon its merits. The costs will abide the event.

The 18th December 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Ancestral Estate—Relinquishment by Widow—Suit by Reversioners.

Case No. 210 of 1873.

Special Appeal from a decision passed by the Deputy Commissioner of Kamroop, dated the 30th November 1872, affirming a decision of the Assistant Commissioner of Gowhatty, dated the 31st July 1872.

Damoodur Surmah and others (Plaintiffs), *Appellants,*

versus

Mohee Kant Surmah and others (Defendants), *Respondents.*

Baboo Obhoy Churn Bose for Appellants.

No one for Respondents.

In a suit for a declaration that plaintiffs were the reversionary heirs of one G T, deceased, and that the act of G T's widow in relinquishing certain land was not binding on them, the defendant, who had taken possession of the jote resigned by the widow, claimed to be the preferential heir. The first Court dismissed the suit, holding that plaintiffs could not sue during the widow's lifetime. The Lower Appellate Court dismissed the appeal without trying the issue which arose between the parties.

The High Court remanded the case, with a view to its being found who was the reversionary heir. If the Court should find that the plaintiffs were the heirs, it would then have to find whether the act of the widow was binding on them. If it found that the act was not binding, it should give them a declaratory decree to that effect.

Kemp, J.—THIS suit was brought by the plaintiffs, special appellants before us, for a declaration that they are the reversionary heirs of one Gopeenath Surmah, deceased, and that the act of the widow of the said Gopeenath Surmah—in relinquishing the land—is not binding upon them. It is admitted that the widow is alive, and the suit is brought to have it declared, as already stated, that her act is not binding upon the plaintiffs, the alleged reversioners. The defendant, who, it appears, on the resignation of the widow of Gopeenath, took possession of the jote in dispute, now challenges the plaintiff's title, and says that he is the preferential heir of Gopeenath.

The first Court, holding that the widow being still alive, the plaintiffs as reversioners cannot sue during her lifetime, has dismissed the suit.

The second Court has not tried the issue which arises between the parties, namely, who is the preferential heir of Gopeenath, but has dismissed the plaintiff's suit and their appeal in a very summary manner. The Deputy Commissioner says that "the present "occupants can resign the land whenever "they find it convenient to do so, and that, "with such relinquishment, all tenant-right "and title thereto is extinguished, which alone "shows the absurdity of the plaintiffs setting "up any claim to it on the ground of a future "right of succession on the death of the exist-"ing tenant." Now this is not the case either of the plaintiffs or defendant, and it is not the issue raised in the Court of first instance. The case is, therefore, remanded for the Court to find clearly who is the reversionary heir of Gopeenath, whether the plaintiffs or the defendant. If the Court finds that the plaintiffs are the reversionary heirs, it will then have to find whether the act of the widow in relinquishing the land is binding upon the plaintiffs; and if it finds that it is not binding, the Court ought to give the plaintiffs a declaratory decree to that effect.

Costs to follow the result.

The 18th December 1873.

Present:

The Hon'ble W. Ainslie and G. G. Morris, *Judges.*

Ejectment—Right of Occupancy—Consent.

Case No. 513 of 1872.

Special Appeal from a decision passed by the First Subordinate Judge of Bhaugulpore, dated the 13th December 1872, affirming a decision of the Moonsiff of Bullia, dated the 25th September 1872

Baboo Huree Pershad (Plaintiff), *Appellant,*

versus

Kanhya Lall (Defendant), *Respondent.*

Baboo Kalee Kishen Sen for Appellant.

Baboos Debendro Narain Bose and *Rajendro Nath Bose* for Respondent.

In a suit by a lessor for ejectment, where the lessee pleaded that, although the term of his lease had come to an end some years back, plaintiff had continued to treat him as a tenant, and that he (defendant) had planted trees on the land with the knowledge and consent of the plaintiff:

HELD that a binding consent could not be inferred from the mere fact of plaintiff having allowed a year or two to expire before he made up his mind in what manner he would deal with defendant, and that his asking after that for a higher rent did not imply anything like ratification of the defendant's act in planting the trees.

Ainslie, J.—THE plaintiff in this suit seeks to eject the defendant on the expiry of a lease for a term. The defendant replies that, although the term of the lease came to an end some years back, the plaintiff had continued to treat him as a tenant, and that he had planted trees upon the land with the knowledge and consent of the plaintiff; and by that consent, and local custom combined, he had acquired an absolute right to hold the land as against the plaintiff.

Both the lower Courts have concurred in dismissing the plaintiff's suit. There has been some difference of opinion between them as to the nature of the lease which was granted by the plaintiff to the defendant; and on this point the judgment of the second Court is in plaintiff's favour. But that Court has come to the conclusion that the defendant had planted the trees with "the knowledge, information, and consent of the plaintiff," and that he is no longer a tenant-at-will. It is this part of the judgment which has been specially sought out for attack. And it is said that this finding is not warranted by any part of the evidence referred to by the Subordinate Judge. The Subordinate Judge relies upon the fact that, although the lease expired in the year 1272, yet the plaintiff received the rents from the defendant for 1273 and 1274, and that he also sued him for enhanced rent for the following years 1275 and 1276.

He says: "This silence of the plaintiff for "a period of four years after the expiration "of the term of the lease, and his simply "demanding the enhancement of the rent, go "to prove that the plaintiff was *not averse* "to the planting of the trees. His displeasure in respect of planting of the trees "commenced only from the time when his "demand for enhancement was disallowed, "and after that he preferred a claim for obtaining possession of the land in dispute."

We think that these are not sufficient grounds on which to found such a consent as would prevent the plaintiff from instituting this suit. The Subordinate Judge, as I understand him, found "knowledge, information, and consent" previous to the planting, and not ratification subsequent thereto.

But on this judgment there is nothing to show that there was anything like a preceding consent; and that there was anything like a ratification surely cannot be inferred from the facts that the plaintiff considered himself entitled to ask for a higher rate of rent, and that, in default of the defendant consenting to give that higher rent, and on failure to obtain a decree for such higher rent, he had recourse to the Collector to eject the defendant summarily. So also the receiving of the rents for the years 1273 and 1274 may show, as the Judge says, that he "was not averse to the planting of the trees." This is a very different thing from giving express permission. He might be content that the trees should be planted, provided that he obtained something in consideration of his allowing the defendant so to deal with the land. And the mere fact of his allowing a year or two to expire before he made up his mind in what manner he would deal with the defendant, does not prove the giving of a consent by which he must be bound.

It has been pointed out by the respondent that there is other evidence on the record besides the evidence which has been referred to by the Subordinate Judge. If it could be shown that the judgment of the Subordinate Judge was founded partly upon the evidence referred to, and partly upon the evidence not specially referred to, and that one portion of the evidence might be struck out without materially affecting the judgment as a whole, we might have been in a position to dismiss

this appeal. But certainly nothing of that kind has been shown. The Subordinate Judge has stated certain grounds as the grounds upon which he relies. As to the other evidence in the case, we find that, on the only point in respect of which he has dealt with it, he has differed from the Court below; and therefore we cannot import into this judgment a concurrence with that Court in respect of any part of the evidence when that concurrence is not distinctly stated by the Subordinate Judge.

We think that the case must go back to the Subordinate Judge that he may come to a clear finding, independently of the matter which has been wrongly used as evidence in this case, as to whether the defendant has, by the consent of the plaintiff or otherwise, acquired a right to hold this land in perpetuity, or, at any rate, so long as the trees shall continue upon it, *i. e.*, the trees upon the planting of which he now claims that right.

Costs will follow the result.

Morris, J.—I concur.

The 19th December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act VIII. of 1859, s. 246—Jurisdiction.

In the Matter of
Gopee Lall Pandey, *Petitioner,*

versus

Lekhraj Roy (Decree-holder), *Opposite Party.*

Mr. T. D. Ingram and *Baboo Bharut Chunder Dutt* for Petitioner.

The Advocate-General and *Baboo Grish Chunder Ghose* for Opposite Party.

On an application being made to a Court which is charged with the execution of a decree, under the provisions of Act VIII. of 1859, s. 246, the only question to be determined is whether or not the judgment-debtor was in possession of the property at the time when the attachment was made.

Phear, J.—In this matter a question of very great importance has been brought before us by the learned Counsel, Mr. Ingram. But we are of opinion, after consideration, that we cannot determine it upon the hearing of this rule. We can only inquire whether the Subordinate Judge, in making the order which is complained of, acted within his jurisdiction or not; and we cannot entertain any question as to the merits of his opinion, so far as he has given the opinion, in the proper exercise of a jurisdiction which belongs to him.

Since the rule was heard, we have had the judgment of the Subordinate Judge translated, and we think, upon the whole, that the Judge has distinctly expressed his conclusion as a finding of fact that the original attachment, which was put upon the property in 1863, had been subsisting up to, and was subsisting at, the time when the application for sale was made. It was plainly competent to the Subordinate Judge in this matter to come to a finding of fact upon that point, and we cannot now entertain any question as to its correctness. We should not be able, if we did, to pass a binding decision upon it as between the parties. It is true that the Subordinate Judge, after having arrived at the conclusion, and expressed it that the attachment, upon the footing of which he was about to order the sale, was an attachment placed upon the property so long ago as 1863, did not in express words state anything with regard to the possession of that property by the judgment-debtor in 1863 at the time when the attachment was made, as he, no doubt, ought to have done under the provisions of section 246; because it is very clear that, on an objection being made to a Court which is charged with the execution of a decree, under the provisions of that section, the question which the Court has to consider and determine is whether or not the judgment-debtor or some one on his behalf was in possession of the property at the time when the attachment was made, that is, the attachment upon which the order for sale is sought. But, although the Subordinate Judge has not expressly directed his attention to the question as to who was in possession of the property when the attachment was put on it in 1863, we think that he has in substance assumed that, at that time, it was in the possession of the judgment-debtor. And further, that, in truth, there was no controversy between the parties upon that point.

Unfortunately, the Subordinate Judge has spoken of the possession of the present petitioner at the time when the present inquiry was made, and while he says that that possession was not a possession on behalf of the judgment-debtor, he goes on to express the opinion that it was valueless as a foundation for the objection made before him, because it had been obtained by virtue of, and in pursuance to, a sale which was void under the provisions of section 240 of the Civil Procedure Code. Now we think that this was a matter which, under the circumstances of the case, the Subordinate Judge

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ght not to have attended to at all. As already been mentioned, the only ques- n he was concerned with was the question to who was in the possession of the perty at the time when the attachment s put upon it—the attachment which he pposed to be the attachment upon which sale was sought.

We think then, on the whole, that seeing t the Subordinate Judge has expressed opinion that the attachment of 1853 was force, and has assumed without any con- versy between the parties that the posses- n of the property at the time when the chment was put upon it was actually in hands of the judgment-debtor, the order ich he has made in this case was an order de within the proper limits of his juris- tion, and therefore that we ought not to urb it.

We express no opinion whatever upon the y important question which the Subordi- te Judge in his judgment seems almost clusively to have directed his attention , and which, no doubt, will sooner or later ve to be judicially tried and determined tween the parties. We think that that estion must be raised in a regular suit stituted for the purpose, and cannot be termined by us on this application.

Accordingly we think that the rule must discharged with costs, which we assess at he gold mohur.

The 28th November 1873.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Res judicata—Splitting of Causes—Act VIII. of 1859, ss. 2 & 7—Construction of s. 372.

Case No. 1542 of 1872.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 6th August 1872, reversing a decision of the Moonsiff of Raojan, dated the 23rd September 1871.

Ram Chunder Chowdhry (Plaintiff), *Appellant,*

versus

Kashee Mohun (Defendant), *Respondent.*

Mr. C. Gregory and *Baboo Debendro Narain Bose* for Appellant.

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Respondent.

B sold to J a turuf of which 3½ kanees were subsequently attached on a decree obtained by M. After objecting unsuccessfully to the attachment, J brought a suit against the auction-purchaser, joining B as a defendant, to have it declared that the 3½ kanees belonged to himself; but failed on the ground that he was holding it benamee for B. Subsequently, the auction-purchaser bought from B the rest of the talook, and sued her for possession. J got himself entered as a defendant under Act VIII. of 1859, s. 73:

HELD that there was no identity between the subjects of the two suits and J's former suit, for all that he was then entitled to sue for on the cause of action that he had on the attachment did not deprive him of his right to a fresh and independent judgment in the present case:

HELD that the former judgment did not operate as an adjudication of the cause in the latter suit; and, if evidence, it was not conclusive evidence or binding on the Judge.

The word "may" in Act VIII. of 1859, s. 372, does not imply *by some possibility*, but means *may not improbably*.

Ainslie, J.—THE first question we have to deal with in this special appeal is whether the matter under inquiry was *res adjudicata*. Clearly it does not come within the terms of section 2 of Act VIII. of 1859; but what we have to consider is whether the former judgment pleaded by the appellant is to be treated as conclusive evidence in the present suit.

In 1226 Muggee, Mussamut Budeeoonnissa sold a certain property, Turuf Mahomed Shureef, to Jan Ali. Subsequently, there was an attachment of 3½ kanees within this turuf on a decree obtained by Bhoobun Mohun. Jan Ali objected to the attachment and sale, but his objection was overruled. He then brought a suit against the auction-purchaser to have it declared that the 3½ kanees sold as the right of Budeeoonnissa really belonged to himself. Budeeoonnissa was joined as a defendant in that suit, though, in fact, she had no part in the act which gave a cause of action to the plaintiff, namely, the attachment and sale of the 3½ kanees. Jan Ali eventually failed in that suit on the ground that he was only holding benamee for Budeeoonnissa. Subsequently Ram Chunder, the auction-purchaser, bought up from Budeeoonnissa the rest of the talook, and brought this suit against her for possession, not making Jan Ali a party. Jan Ali came in and got himself entered on the record as a defendant under section 73. The cause of action in the present suit is

non-delivery of possession to the plaintiff by his vendor. No cause of action whatever could have accrued to the present plaintiff, and nothing touching the subject-matter of this suit could be determined as between the present plaintiff and Jan Ali at the date of the former decree, inasmuch as the plaintiff had then acquired no rights whatever, except in respect of 3½ kanees of land; but it is said that he stands in the place of Budeeoonnissa who was a party to the former suit. As a matter of fact, there was no dispute at that time, as far as we know, on the record of this case, between Jan Ali and Budeeoonnissa in respect of the subject of the present suit. There is no identity between the subjects of the two suits; the 3½ kanees covered by the former decree have been excluded from the present claim; there is no ground for a claim, and in fact there was no claim in the former suit for adjudication of title in respect of the entire turuf (although, for the purposes of that suit, it was necessary for the Court to consider the question whether Jan Ali's purchase was real or benamee), and the determination of the point in that suit is not conclusive for any other purpose. This is not a case in which a party, plaintiff or defendant, has split his claim or his defence, and is asking on the part reserved to get a fresh hearing. Jan Ali sued for all that he was then entitled to sue for on the cause of action that he had on the attachment and sale, and it is not to be attributed to him as an error or misconduct that he did not raise the question as to the entire turuf, for he was in possession of all except the 3½ kanees; and if it so happens that the form that the litigation has taken gives him an opportunity to be heard again in the same matter, there being no such contrivance on his part to secure this opportunity as might bring him within the reach of the rules of procedure which provide against the splitting of claims, he cannot be deprived of his right to a fresh and independent judgment in the present case. There was, indeed, an order passed in that suit, directing Jan Ali to put in stamps in proportion to the value of the entire turuf, and he appears to have complied with that order; but whatever he may have done under the directions of the Court, did not change his cause of action. The cause of action in a suit does not consist merely in the existence of a right; there must also be an invasion of that right by the party against whom the assistance of the Court is invoked.

The respondent has cited cases in the 8th Weekly Reporter and in the 19th We Reporter; the latter is a Full Bench judgm which will be found reported at page 3 that Volume. Mr. Gregory, for the appe objects to the authority of that judgment the ground that the matter there was spe the first judgment in that case being th a Court of limited jurisdiction. We th fore prefer to go back to a passage w occurs in the 5th Weekly Reporter, Ac Rulings, page 5, in which Mr. Justice Mo cites the authority of Vice-Chancellor K Bruce, prefacing his quotation as follo "The rule concerning the extent of operation of a judgment in precluding f litigation is thus laid down by authority." The rule in the quotation w follows seems to us to be conclusive in case. It is as follows: "It is, I think, t "collected that the rule against re-agit "matter adjudicated is subject generall "this restriction—that, however essential "establishment of particular facts may "to the soundness of a judicial decis "however it may proceed on them "established, and however binding a "conclusive the decision may, as to "immediate and direct object, be, those f "are not all necessarily established co "clusively between the parties, and t "either may again litigate them for a "other purpose as to which they may co "in question: Provided the immedi "subject of the decision be not attempted "be withdrawn from its operation, so as "defeat its direct object. This limitation "the rule appears to me, generally speakin "to be consistent with reason and co "venience and not opposed to authority. If, then, the former judgment does not opera as an adjudication, it is hardly worthwhi to inquire whether it is even evidence. it is evidence, and the Judge below not "that it has been admitted as such by th "first Court, and the weight to be attache "to it still requires to be considered," it wa not conclusive evidence; and taking it a matter to be considered by, but not bindin on, the Judge, we cannot say that he wa wrong in law in attaching very little weigh to it.

The next objection is that the Judge ha only determined the genuineness of Jan Ali's bill of sale which is not denied, and that he did not consider its operation. This is a mere piece of verbal criticism; for, although the Judge only used the word genuine, it is quite evident from the context that he means genuine and operative, for he goes on to

cuss the question of its character, and is that it effected a *bond-fide* transfer of ssession. Then it is said that the Judge l not direct his mind to the points which the real tests of the *bona fides* of a nsaction as to which a question is raised ether it is real or benamee, such as the rce from which the purchase-money was ived, the enjoyment of the rents and fits, the possession of the title-deeds, and mode of dealing with the property before d after the alleged transfer; and that he o overlooked the possession held by Jan i as purchaser of the intermediate rights one Atesh Ali. With one of these points, mely, the source from which the purchase-ney was derived, he has certainly not alt, but it has not been shown to us that re was any material before him upon ich the Judge could come to a decision. he other points he has considered and termined, and it is not open to an appellant special appeal to urge that the decision of e Court below is against the weight of the idence.

Then there is another error alleged the reception of what was put forward an admission of Budeeoonnissa in another it. Whether there was such an error not, we do not propose to consider. is not every error which warrants a mand. We have to be satisfied, to use the nguage of section 372 of the Procedure ode, that the error is a substantial error hich may have produced an error or defect pon the decision of the case upon the erits. I do not think that the word "may" nplies may *by some possibility*, but that means *may not improbably*. It is for us exercise our discretion in determining hether there is such a probability, whether ere has been a fair and sufficient trial, and hether the litigation has reached a stage at hich it ought to cease or not. In the xercise of that discretion, we think that, ssuming that there is such an error in the dgment of the Court below, it is not one hat we ought to notice, considering the many other reasons on which the decree of he Lower Appellate Court is based.

Under these circumstances the special ppeal must be dismissed with costs.

The 1st December 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, *Judge*.

Pleadings in Indian Courts—Construction—Issues—Jurisdiction—Act XVII. of 1873—Nawab Nazim of Moorshedabad.

Case No. 218 of 1872.

Regular Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 7th June 1872.

His Highness the Nawab Nazim of Bengal (Defendant), *Appellant*,

versus

Amrao Begum and others (Plaintiffs), *Respondents*.

Baboos Obhoy Churn Bose and *Chunder Madhub Ghose* for Appellant.

Mr. Pugh and *Baboos Nil Madhub Bose* and *Gunesh Chunder Chunder* for Respondents.

Pleadings in Indian Courts should not be construed with the same strictness as they are in English Courts.

Parties are not bound by an opinion of the lower Court on a matter not in issue in the same manner as if the Judge had decided an issue formally and properly raised before him; and when a case comes before the High Court on appeal, it should be determined upon the issues and grounds raised in the Court below, except where, under Act VIII. of 1859, s. 354, the Court would consider it right to frame an additional issue.

Act XVII. of 1873 was not intended to deprive the Nawab Nazim of Moorshedabad of any right of appeal to the High Court which he had before it was passed.

Couch, C.J.—The plaint states that the plaintiffs sued for a declaration of right to, and recovery of possession of, the lands, premises, &c., of which the particulars are set forth in the schedules annexed thereto, and for the mesne-profits thereof, and for arrears of maintenance charged upon the inheritance of the estates also mentioned in the schedule. It then sets forth various facts: That Ameeroonnissa Begum, widow of the deceased Nawab Nazim Alijah, died intestate, leaving her surviving her step-brother and adopted son Mehdi Ali Khan, and leaving considerable immoveable property of which the said Mehdi Ali took immediate possession; that the deceased Ameeroonnissa also died possessed of moveable property of

considerable value of which, as well as of the immoveable properties aforementioned, the defendant No. 1, the Nawab Nazim of Bengal, took forcible possession; that, on the 22nd Magh 1272 B. S., Mehdi Ali died intestate, leaving him surviving his two daughters, the plaintiffs, his widow, the defendant Azeezoonnissa, and his mother, Fuzluloonnissa Begum, who also died intestate, leaving her surviving the present plaintiffs as sole heiresses; that the defendant Azeezoonnissa refused to join the plaintiffs in the institution of this suit; that the plaintiffs are the owners of the properties specified in Schedule C, and, at the time of the death of Ameeroonnissa, they were in possession thereof; but that, after her decease, they were also dispossessed of the same by the defendant aforesaid. It then states that the said defendant, on the 25th of February 1858, granted to Mehdi Ali Khan a sunnud, whereby maintenance at the rate of Rs. 600 per mensem was assigned to him and his heirs, and charged on the yearly rental of the mehals belonging to the Nawab Nazim. Then it alleges what was done with regard to the expenses of the Mohurrum, and that the plaintiffs are entitled to a portion of what was given for those expenses, and claims as due to the plaintiffs Rs. 85,320 on account of maintenance, and also claims the rents and profits of the lands mentioned in Schedules A, B, and C.

Now, in considering what is the effect of this plaint, we must bear in mind what has on more than one occasion been said by the Judicial Committee of the Privy Council that pleadings in Indian Courts should not be construed with the same strictness as they are in English Courts. Allowance must be made for what our experience tells us exists here, a very inaccurate mode of setting forth the claims of persons and the answers or defences to them. It would be quite incorrect to look at a plaint in these Courts in the same manner as a declaration in an English Court, which it seemed we were asked to do. Further, the Code of Civil Procedure in stating what shall be in the plaint says that it shall contain the relief sought for, the subject of the claim, the cause of action, and when it accrued, and if the cause of action accrued beyond the period ordinarily allowed by any law for commencing such a suit, the ground upon which the exemption from the law is claimed. This plaint contains all that, and it also, although in an informal and loose way, points to what may have been the consideration for the grant of the maintenance. It does not expressly say what the consideration was, but states facts from whi it might be inferred that there was a co sideration for the grant of maintenance the sunnud. It is not necessary that consideration, if there was one, should stated in the grant. There is no law whi requires that the consideration should appe in the instrument, and from the position these parties it certainly was not likely th the sunnud would contain a statement of t consideration. Now, to see what question w raised upon the matter of the considerati we must look at the first of the writt statements. In no part of it was it sa that there was not a consideration for t grant; and no issue was framed in the fi Court as to what the consideration was. the defendant had desired that the circu stances under which this sunnud was giv should be inquired into with a view to sh that there was no consideration for it, a that therefore he was not bound to pay t money, he ought to have raised the questi in such a way that the plaintiffs would b required to go fully into all the circumstance and to show, if they could, that there was consideration which made it just that the pa ment of the maintenance should be enforce That was not done, and it would, we thin be most unjust if this Court, when the ca comes before it in regular appeal, were give effect to an expression of opinion b the lower Court, not upon an issue raising th question, but upon one which had little nothing to do with that question, an issue law. The finding of the lower Court upo an issue before it is material, but, if th Judge goes out of his way and expresses a opinion upon a matter not in issue, th parties are not to be bound by it in the sam manner as if he had decided an issue formall and properly raised before him. It appear to us the appellant is not now at liberty t contend that this grant is invalid or no capable of being enforced against th defendant, because it is not shown that ther was any consideration for it. It has bee laid down by the Judicial Committee of th Privy Council in the case in 12 Moore' Indian Appeal cases, page 475,* that a appeal ought not to be determined on issue or grounds not considered or taken or trie in the Courts below when the defendant, i his answer, has put his defence upon certai grounds. We think that is applicable whe this Court is hearing a regular appeal, excep in cases where, under section 354, the Cour

* 11 W. R. (P. C.) 27.

ld consider it right to frame an additional e. The general rule, that, when a case es before the Court on appeal, it should determined upon the issues and grounds ch have been raised in the Court below, ne which we ought to follow. Where find that the defendant has, in his written ement, raised a question which it was ma- al or necessary for the decision of the case the merits to determine, we should exercise power which we possess under that ion; but, where the question is not ed by the defendant, we do not think we called upon to allow it to be raised and d at this stage of the case.

The case comes before us in appeal, and refer to the grounds of appeal to see what complained of in the decision of the lower rt. We are obliged to do so, because must say that we could not clearly derstand the arguments addressed to us on part of the appellant. The first of the unds of appeal is that, "when the Judge in decreeing the plaintiff's claim to mainten- nce says he acted upon the admission of the defendant in the Gopeenathpore case, such dmission, before being acted upon, ought to have been proved in this case, and the copy of such admission, as contained in the copy of his deposition in that suit, when his evidence in this case is available, is not admissible." This has apparently been andoned, as it was not taken before us.

The second is that, "supposing the copy of the deposition is admissible, and can be acted upon, still that admission shows that the maintenance was given without any consi- deration, and it was granted only by way of alms to a beggar, which the donor was quite competent to stop at his pleasure, and as such there being no legal rights to it in the donee, the donee, much less the plaint- iffs, who derive their right from him, can enforce payment of it in a Court of law." Certainly, considering that the written statement does not contain any such allegation as that, the maintenance was granted only by way of alms to a beggar, we are rather surprised by this ground of appeal. Such a question, if it was intended to be raised, ought to have been raised in the issues in the Court below, and not at this stage of the suit. The third ground is that, "even if the "admission made by the defendant in the "Gopeenathpore case could be acted upon, still "the whole of it ought to have been taken "into consideration, but the Judge has failed "to take that part of it into consideration "where the defendant said Mehdi Ali told "him that he had given up all claims to "Ameeroonnissa's property." This has not been presented to us in the argument, and we must consider it abandoned also. The fourth ground is that, "when it is evident "that the maintenance was dependent "upon Mehdi Ali's giving up all claims to "Ameeroonnissa's properties, and it is in "evidence that he and the plaintiffs subse- "quently most persistently continued to claim "such properties, the right, if there was any, "for maintenance has been forfeited." Now the sunnud certainly does not contain words which would support this ground of appeal. There is nothing in it which says that the maintenance was dependent upon the plaintiffs not claiming the property, and that their right to maintenance was to be forfeited if they did so. If the plaintiffs had given up the property as a consideration for the grant of the maintenance, they would no doubt be bound by that, and could not afterwards recover it; but there is nothing to show that they did this. The fifth ground is that the non-production of the original sunnud not having been accounted for, copy of it is not admissible. This has not been relied upon, nor has the sixth, which says that the admis- sion being contained in the copy of the deposition in another suit when the evidence of the deponent is available in this case, the copy is not admissible. The seventh ground is that, "supposing the copy of the sunnud "is admissible, it no where states that the "maintenance was granted in consideration "of affection, and the Judge was wrong to "assume without proof that the grant was "made in consideration of affection." It really does not matter whether the Subordi- nate Judge was right or not in assuming that it was so; for, as we have said, it was only a remark made by him when deciding the question of limitation, and not when he was deciding the question of what was the con- sideration for the sunnud. It would have been better if the Subordinate Judge had not made any remark, and had avoided going into any question of that kind, as it had not been raised in the case. The eighth ground has not been taken before us, *viz.*, that the circumstances show that the defendant could not possibly have any affection for Mehdi Ali, far less for the plaintiffs. The ninth is that "when the Judge admits that the right "claimed by the plaintiffs in this suit had "existed in their predecessors from before, "and neither he nor they chose to assert "that right in any of the previous litigations, "the Judge ought to have held the plaintiffs

"barred from claiming that right now." We do not quite understand what this means, and it also has not been taken before us. It does not therefore appear to us that any ground is shown for holding that the Subordinate Judge has not come to a right conclusion in this case.

Then as to the Act which has been referred to, Act XVII. of 1873, if it has any operation at all upon the present suit, it would be that the plaintiffs will not be able, except under that Act, to get the benefit of the decree which they obtained in the lower Court. If the Act prohibits any further proceedings in a suit instituted before the Act was passed, the effect would be to stop this appeal, and prevent the present appellant from raising any question here as to whether the decision of the Court below was right or not. We think the Act could not have been intended to deprive the Nawab Nazim of any right of appeal to the High Court, which he had before it was passed. As we have already said, if it has any effect at all, it is to prevent any decree being enforced against the property or the person of the Nawab Nazim.

Section 11 says: "No suit shall be "commenced or prosecuted, and no writ or "process shall, at any time, be sued for "against the person or property of the said "Nawab Nazim, unless such suit be com- "menced or such writ or process be sued for, "with the consent of the Governor-General "in Council first had and obtained. Such "consent shall be certified by the signature "of one of the Secretaries to the Govern- "ment of India, and every such signature "shall be judicially noticed. And any suit "which, at any time, shall have been, or shall "be, commenced, and any writ or process "which, at any time, shall have been, or shall "be, sued for against the person or property "of the said Nawab Nazim, shall be of no "effect, unless and until the consent of the "Governor-General in Council certified in "manner aforesaid is obtained." The plaintiffs will not be able to obtain the benefit of the decree without such consent.

The other objection which has been raised, *viz.*, that the two brothers of Mehdi Ali have not been made parties to this suit, and consequently the decree awards to the plaintiffs more than they are entitled to receive, has been disposed of in the course of the argument. It does not appear that the brothers are entitled to anything; and, further, this is not a point taken in the grounds of appeal.

The appeal must be dismissed with costs.

The 3rd December 1873.

Present:

The Hon'ble F. B Kemp and W. Ainslie, *Judges.*

Hoondees—Notice of Dishonour—Time of Service—English Law.

Case No. 38 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Luckhimpore, dated the 4th January 1873.

Anunt Ram Agurwalla (one of the Defendants), *Appellant,*

versus

R. D. Nuthall (Plaintiff), *Respondent.*

Baboos Sreenath Doss and *Bhugobutty Churn Ghose* for Appellant.

The Advocate-General and *Mr. Macrae* for Respondent.

As regards notice of dishonour in connexion with hoondee-transactions amongst natives of this country, although the strict rules of English Law as to the time within which service of such notice must be made do not apply, yet the endorsee is bound to give the endorser notice, within a reasonable time, of his intention to come upon him, so as to enable the latter to take the necessary steps for his own protection. The question as to what is reasonable notice is to be settled by local custom; and where a party has been prejudiced by the want of such notice, this is to be taken into consideration.

Kemp, J.—As the Deputy Commissioner and Subordinate Judge of Luckhimpore has stated the facts of this case very fully in his decision, I do not propose to do more than to go over them very briefly. The plaintiff, Mr. R. D. Nuthall, brings this suit to recover Rs. 12,000 with interest from the 1st of October 1868 to the 31st August 1871, amounting to Rs. 4,200, or altogether Rs. 16,200, as against the defendant No. 2, from which sum he deducts a sum of Rs. 4,000. The facts are briefly these: That the plaintiff Mr. Nuthall was the proprietor of a tea-garden of the name of Jeypore which he sold to the Northern Assam Tea Company. The defendant No. 1, Mr. Campbell, acted as the agent of Mr. Nuthall in this transaction. It appears that Mr. Nuthall originally demanded a much larger sum for his tea-garden than that at which it was eventually sold. After some negotiations, Mr. Campbell, on behalf of the plaintiff, settled the price of the garden with the Company at Rs. 24,000. The Company, out of that sum, paid Rs. 8,000 in cash, and

ive promissory notes for the balance of Rs. 16,000. Mr. Campbell, who acted as agent for the plaintiff, being aware that the company, although not insolvent, was in a somewhat shaky state, recommended to his principal, Mr. Nuthall, to discount these bills in the bazar. Mr. Nuthall then instructed Campbell to negotiate these bills at five per cent., and it was the impression of Mr. Nuthall, a rather extraordinary one we may observe, that bills could be discounted in a local bazar in Assam at five per cent. per annum. However, be that as it may, Mr. Campbell disposed of these bills to the defendant No. 2, Anunt Ram Agurwalla, who, we may remark, is also the banker of the Northern Assam Tea Company, for Rs. 11,000. Out of this sum Rs. 3,000 were paid, and there was an understanding that the balance was to be paid in six weeks. The transaction as between Campbell, the agent, and Anunt Ram, thus appears to me to have been on this footing: That the promissory notes of the Northern Assam Tea Company for Rs. 16,000 were purchased by Anunt Ram at a discount of 5 per cent. per mensem, or of 30 per cent. on the first bill, which was for Rs. 8,000 at 6 months' sight, and 45 per cent. on the second bill for Rs. 8,000 at 9 months'.

The Deputy Commissioner appears to me to have taken a proper view of this case. Clearly the suit, as originally framed by the plaintiff, was not maintainable, but the Deputy Commissioner has laid down the proper issues; and, under section 139, Act VIII. of 1859, the Court, after inquiring and ascertaining upon what questions of law or fact the parties are at issue, is thereupon to proceed to frame and record the issues of law and fact on which the right decision of the case may depend, and the Court may frame the said issues from the allegations of fact which it collects from the oral examination of the parties or their pleaders, *notwithstanding any difference between such allegations of fact and the allegations of fact contained in the written statements of the parties.* Now I am of opinion that the Deputy Commissioner has raised the proper issue in this case, *viz.*, the 3rd issue of law, which runs thus: "Whether, under the circumstances of this case, the transaction "ought to be considered as a valid and binding sale of the bills, or whether, on the "contrary, the defendant is not at liberty to "recover the amount paid in part price of "these bills from plaintiff." Upon this issue, after stating the facts of the case, the Deputy Commissioner comes to the conclusion that the defendant No. 2 purchased these bills at a great advantage as a speculative purchase. The Deputy Commissioner has not treated the transaction as an ordinary discount transaction, but as an out-and-out sale to the defendant No. 2, at his own risk. He has therefore given the plaintiff a decree against the defendant No. 2, Anunt Ram Agurwalla, for a sum of Rs. 8,000, after deducting from Rs. 11,000 the Rs. 3,000 which were paid by Anunt Ram, and has given interest upon the sum decreed, after allowing six weeks from the date of the sale of the notes, at the rate of 12 per cent. per annum from the 15th of November 1868.

Against this decision the defendant No. 2 has appealed. The defendant No. 1 appears to have compromised with the plaintiff, and is not now before the Court.

I am clearly of opinion on the evidence in this case, and taking the whole circumstances into consideration, that the finding of the Deputy Commissioner that this was a purchase and not an ordinary discount transaction is a correct finding. It appears to me from the circumstances of the case that the defendant No. 2, who, as the banker of the Northern Assam Tea Company, was in a position to know the position and the stability of the Company, was well aware at the time he purchased these bills that the Company, although not insolvent, were in a shaky position. In his evidence, for he has been examined in the Court below, the defendant No. 2 says that "he purchased the promissory notes as a speculation;"—he also admits that he has included the amount due under these promissory notes in the claim which he has made against the Northern Assam Tea Company, and which claim is now pending before the Court of Chancery in England.

There is therefore a clear admission on the part of the defendant No. 2 that he purchased these notes as a speculation. It is also clear on the evidence that Mr. Nuthall, after hearing from his agent of the sale of the promissory notes to the Mahajun, the defendant No. 2, at the rate of discount of 5 per cent. per mensem, repudiated that transaction, and offered, through his witness, Dr. White, to repay the unpaid Rs. 2,000 out of the Rs. 3,000 which the defendant No. 2 had at first paid in part for the bills of sale, the Mahajun having already received back Rs. 1,000 from the plaintiff's agent, Mr. Campbell. Dr. White deposes that he pointed

out to the defendant No. 2 that the Company were in a shaky position, and that he would probably lose by holding the notes, and he guaranteed to him, the defendant No. 2, the refund of the balance due to him, namely, Rs. 2,000, but the defendant with this warning distinctly declined to give up the notes, stating that he would "hold to his bargain."

I therefore, treating this as a purchase, and not as an ordinary discount transaction, would confirm the decision of the first Court with one modification, namely, with reference to interest. I am of opinion that the plaintiff is not entitled to interest as awarded to him by the Deputy Commissioner, but that he is only entitled to interest from date of suit, inasmuch as it does not appear that, after the six weeks had elapsed, which was the term within which the defendant No. 2 had contracted to pay the balance of the Rs. 11,000, any demand was made by the plaintiff or his agent on the defendant No. 2 for the payment of that balance. I am therefore of opinion that the plaintiff is entitled to recover interest from date of suit only.

Then it has been said in the course of the argument that, if the defendant is liable on this contract, treating it as an absolute purchase, he can set off his cross-right to sue the plaintiff on the promissory notes which have been dishonoured, and till the matter involved in the suit in Chancery is decided, the plaintiff's right against the defendant must be suspended. I think this contention is not tenable, for it is clear that no notice of dishonour was given to the plaintiff, Mr. Nuthall, by Anunt Ram; but it has been said that no notice is necessary in this country, and, in support of that contention, two decisions have been referred to, and the pleader for the appellant contends that notice is not absolutely necessary in this country as amongst natives.

Now I do not find that any decision of this Court has gone this length, namely, that no notice of dishonour is requisite amongst natives of this country with reference to hoondee-transactions. What has been ruled is simply that the strict rules of English Law as to the time within which service of such notice must be made do not apply to such transactions in this country. I do not find it in any case laid down broadly that no notice is necessary. On the contrary, the Courts have always left the question as to what is reasonable notice to be settled by evidence of local custom; and the Courts have also held that, where it can be shown that a party has been prejudiced by the want of such notice, the Court would take it into consideration. It is very clear in this case that the plaintiff has been prejudiced. There is the uncontradicted and reliable evidence of Dr. White to that effect. I therefore concur with the Court below in giving the plaintiff a decree for Rs. 8,000 but with interest from date of suit only, in modification of the decree of the Deputy Commissioner which awards interest from the 15th of November 1868.

The costs of this appeal will be paid by the appellant, defendant No. 2.

Ainslie, J.—I have been unable to satisfy myself on the evidence that the transaction was of the nature of an out-and-out sale, leaving the purchaser no right to have recourse to the seller of the promissory notes in the event of their not being duly discharged. The evidence on this point is to be found entirely in the evidence of witnesses called by the plaintiff himself; partly in that of Anunt Ram, the taker of the promissory notes, and partly in that of Mr. Campbell, through whom the notes were made over to him. Anunt Ram says: "The custom in negotiating notes is that, if "they are returned to the purchaser dishonoured, he recovers the amount paid by "him for them with interest for the time "being; and, in case of refusal to refund, he "would bring his action against the person "who sold them." He distinctly states the custom to be that the endorser is responsible to the endorsee in case of dishonour. Then Mr. Campbell says: "The defendant No. 2 "(Anunt Ram) did desire me to enter a con- "dition in regard to how he was to recover "the amount due on the notes, should the "Company fail to honour them. I do not "recollect making any condition in the "matter with him, but I told him that he "took over the promissory notes on the "ordinary terms of such transactions."

Now what were the ordinary terms is not shown in any way except by Anunt Ram's own evidence, and therefore I should hesitate to concur in the finding of the Court below as to the nature of the transaction. This, however, has no effect on the result of this appeal; because, assuming that Anunt Ram had a right of recourse to the endorser, it is quite clear that he was bound to give him, within a reasonable time, notice of his intention to come upon him, so as to enable the endorser to take such steps as he might deem necessary to protect himself; and, as already pointed out by my learned brothe

e evidence of Dr. White shows clearly at there was a material loss caused to the dorser in consequence of want of notice, d that, if he had been informed that he s to be held responsible for the full nount of the notes, he would in all proba-lity have been able to recover that amount om the moveable and immoveable property the Company then available within the strict. If the appellant Anunt Ram had ven due notice to Mr. Nuthall when the lls were dishonoured, he might have asked e Court to suspend its decree until he had ken steps to obtain a decree against uthall. The fact that he was taking pro-eedings in England would be no bar to his btaining a decree; he would be entitled proceed against all persons chargeable, nd to execute his decrees subject to this ndition that, when once execution, where-ver obtained, had brought about a satisfac-on of the total demand, no further execu-ion of any of the decrees should proceed. ut, as he has failed to give notice, he has st his right to make such application to the ourt, and therefore there is no defence to he present suit.

Taking that view of the case, I concur in odifying the decree as proposed by my earned brother and in dismissing this appeal.

The 3rd December 1873.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Remand—Default—Act VIII. of 1859, s. 347.

Case No. 240 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Chittagong, dated the 6th February 1873, affirming an order of the Moonsiff of Howlah, dated the 5th July 1872.

Triloke Chunder Sen (Judgment-debtor), *Appellant,*

versus

Aukhil Chunder Sen (Decree-holder), *Respondent.*

Baboo Motee Lall Mookerjee for Appellant.

Baboo Huree Mohun Chuckerbutty for Respondent.

A case having been remanded to the Lower Appellate urt, the appellant did not put in any appearance, and took no steps to produce evidence; but, while the Judge was writing his decision, the pleader appeared and stated that he had received no instructions:

HELD that the Judge was perfectly right in dismissing the appeal on default with costs, and that the remedy lay in an application under Act VIII. of 1859, s. 347.

Kemp, J.—THIS case was remanded by Justices Markby and Ainslie. On remand, the Judge of Chittagong states that the appellant has not put in any appearance, and has taken no steps to produce evidence; that, while he, the Judge, was writing his decision, Baboo Koylash Chunder Gooho appeared and stated that he had no evidence to produce, that he had received no instructions, and that he was not acquainted with the grounds of remand; and he made no application for a postponement of the case or for time to summon witnesses, or produce evidence. The Judge then observes that the order of remand of this Court was passed so far back as the 21st of September 1872, so that the appellant has had sufficient time to instruct his vakeel, and there being no application before him for an adjournment, the case was disposed of under section 346 of Act VIII. of 1859.

The pleader for the respondent takes a preliminary objection that no appeal lies, and that the only remedy open to the appellant was under section 347. The pleader for the special appellant relies upon section 372 of Act VIII. of 1859, and on being questioned by Mr. Justice Ainslie as to what portion of that section his appeal comes under, he replied that the decision of the Judge was "contrary to law." Therefore the question we have to decide is whether the decision of the Judge is "contrary to law."

We think the decision of the Judge was perfectly legal. It is clear from his judgment that the appellant did not appear either in person or by pleader. The mere fact of the pleader coming into Court while the Judge was writing his judgment, and informing the Judge that he had received no instructions, is not entering appearance, and therefore the Judge was perfectly right in dismissing the appeal on default with costs. The remedy of the special appellant was to make an application under section 347; not having done so, the special appeal must be dismissed with costs. Pleader's fees two gold mohurs.

The 3rd December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Attachment—Act VIII. of 1859, s. 270—Execution-proceedings.

Case No. 239 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 4th September 1872, affirming a decision of the Officiating Subordinate Judge of that District, dated the 12th September 1871.

Mussamut Binda Bibee *alias* Nunhee Bahoo (Plaintiff), *Appellant,*

versus

Lalla Gopeenath and others (Defendants), *Respondents.*

Moonshee Mahomed Yusuff for Appellant.

Baboos Sreenath Doss and *Mohesh Chunder Chowdhry* for Respondents.

An attachment made pending execution-proceedings in the case of a decree for possession and mesne-profits not assessed is not an attachment such as is contemplated by Act VIII. of 1859, s. 270.

Where execution-proceedings are struck off, the act means a complete termination of the case and the removal of any attachment therein; but the restoration of he proceedings does not necessarily imply that the attachment is also restored.

Phear, J.—WITH deference for the view taken by the Judge of the Lower Appellate Court in this case, it appears to us that the plaintiff has certainly, on the facts found by both the Courts below, established his claim against the defendant. The section 270 of the Civil Procedure Code says that, when a sale of the attached property takes place, the proceeds shall be applied to the satisfaction of the decree of the person who first attached. And it has been held by a Full Bench of this Court that these words give the person, who first attached, a right to sue any one else who may have been wrongly paid by Court out of the proceeds in preferen him, in order to recover from such pe the money which has been so paid. plaintiff in this case says that, although property of a certain person was sold in cution on the application of the defen yet, at that time, he, the plaintiff, had a attachment, and was therefore entitled t paid his debt out of the proceeds of sale in priority to the defendant. The att ment upon which the plaintiff relies made on the 16th February 1869; and last attachment made by the defendant be he obtained the order for sale was effecte the 9th March 1869. We speak of it a last attachment, because there was certa another attachment made at the insta of the same person previously, *i.e.*, so e as September 1864, and there appear have been between these two dates an a tive attempt to get the Court to attach property on another occasion.

If the attachment effected by the plain on the 9th March 1869 was the actual co mencement of the attachment which w subsisting when the defendant sold, th clearly the defendant's attachment is subs quent in date to that of the plaintiff. B the defence is that the attachment of Septe ber 1864 was a good and valid attachme within the meaning of section 270 o the Civil Procedure Code, and continue unbroken and in force up to the 9th Marc 1869, when the second attachment was made and further continued in force down to th time when the sale was made. In other words the attachment of the 9th March 1869 was altogether an useless and unnecessary act o the part of the Court. But we find, upon looking to the facts which are presented to us by the lower Courts, that the attachment of September 1864 was a general attachment made after a certain decree for possession and mesne-profits had been passed in favour of the present defendant, but before the mesne-profits had been estimated or assessed.

The petition for attachment did not specify any sum of money in respect of which the attachment was sought. And, in truth, no such specification was possible unless it was confined to a certain amount of costs, for, at that time, there had been no final decree, no final money-decree, passed. The present defendant in that suit in September 1864 had only obtained a decree for possession of certain immoveable property and a right to have the mesne-profits assessed in the execution-proceedings. Until those mesne-profit

e assessed, clearly there was no final ey-decree passed in his favour. There no decree which he was in a position to upon the Court to execute and to realize e shape of money. And as it happened, er by reason of his own dilatoriness or e delay of the Court itself, he did not a final decree or assessment of any speci- amount of mesne-profits until the year 6. So that up to the year 1866, at any , he was not in possession of a decree for ney which he could execute. Now the l Bench decision, which is reported in Weekly Reporter, page 9, distinctly down that the word *attached* in ion 270 means "attached in execution of ecree within the meaning of Chapter 4 of Code;" that is, obviously, as we think, cution of a decree which is a final decree money, and which is capable of being mpletely executed at the time when the achment is asked for and made.

The late Chief Justice in that case pointed various inconveniences and anomalies ich would occur if the attachment spoken in section 270 were construed so as to clude attachment effected before decree. nd we need hardly remark that every one those inconveniences and anomalies would anifestly present themselves here if the erpretation which the present respondents sire us to put upon this word attachment s adopted. An attachment before the al assessment of the mesne-profits was ade would be exactly in the same situation regards the Chief Justice's arguments as attachment before a final money-decree as passed. It seems, therefore, very plain at the reasoning upon which the Full ench placed its decision in that case obliges s to hold that an attachment made pending execution-proceedings in the case of a decree for possession and mesne-profits not assessed is not an attachment such as is contemplated by section 270. This being so, we think that the Lower Appellate Court was wrong in holding that the defendant's attachment of September 1864 was an attachment within the meaning of that section prior to the present plaintiff's attachment, and therefore gave him, the defendant, a right to the money. At any rate, it could only give him such a right to the extent of the costs which were awarded to him in his first decree. But, although those costs were included in his application for attachment, it is clear that that attachment was not sought with a view to obtaining execution of the decree so far as it was then capable of being executed by realization of the amount of those costs, but for the purpose merely of keeping the property within reach of the Court and available for satisfaction of the amount of mesne-profits as soon as that amount should be ascertained.

But however this may be, we think that there is another even more complete obstacle to the maintenance of the right set up on the part of the defendant, because we think that it is beyond question in this suit, on the facts which have been found by both the lower Courts, that the attachment of September 1864, whatever was its value, was at an end—altogether at an end—and removed before the attachment of the 9th March 1869 was effected. We observe in the first place that on the 16th March 1865, in the course of the execution-proceedings of the former suit, that is to say, the suit in which the present defendant had obtained his decree, both parties had notice to appear before the Court in the matter of those execution-proceedings for the hearing and final determination thereof. But inasmuch as, notwithstanding that notice, the present defendants failed to appear, the Gourt struck off the case. That act by itself can scarcely under the circumstances bear any other meaning than that the Court thereby effected a complete termination of the case; if we knew nothing more than this of the matter, the order then made must be taken to have had the effect of removing the attachment and putting an end to the execution-proceedings altogether. No doubt at a later hour, in the course of the same day, the present defendants did come into Court, and induced the Court to restore the proceedings; but no order seems to have been made at that time to the effect that the attachment also should be restored. However this may have been at that time we need not now greatly trouble ourselves to ascertain, because we find that nearly three years afterwards, namely, on 25th January 1868, the present defendants applied to the Court again in those very execution-proceedings in order to get satisfaction of the complete decree for mesne-profits which they had then obtained, by the sale of certain specified property belonging to the judgment-debtors, which we understand was the property, or part of the property originally attached, and the subject of the final sale. On this application, the Court, in the exercise of the discretion which it was bound to apply to the matter, acted as if there was no attachment at that time subsisting. It expressly said that there was no attachment subsisting, and by an order made on the 6th February 1868

called upon the applicant to pay tullubana fees for effecting the necessary attachment. This the applicants, *i.e.*, the present defendants, failed to do, and accordingly, on the 18th of the same month, the case was struck off. Ten months after this, again, the present defendants did apply for a fresh attachment, namely, on the 31st December 1868. The attachment was made on the 9th March 1869, and it was upon that attachment so following upon that application that the sale-proceedings eventually took place. That suit is not now before us; the parties in this appeal are not the parties to that suit; we cannot now review what was done in that suit. It would be beyond our jurisdiction to say that the order of the Court in those execution-proceedings was a vain order or a wrong order. We are not here called upon to satisfy ourselves as to what was the effect of some doubtful or ambiguous proceeding on the part of the Court which was charged with the execution of the decree in that case. We have no such question before us as that very common one, whether or not the Court by striking the execution-proceedings off its file meant to terminate them altogether, and to remove the attachment. We have before us the express finding of the Court that there was no subsisting attachment, and the order which it made thereon. We must take it that it was a right order between those parties, and that the judgment-debtor's property in that suit was not attached before the 9th March 1869. So that it appears to us there is really no occasion, as between the present parties, to inquire what was the effect of the earlier proceedings of September 1864, and so on. All that matter has been put at rest. There was clearly no attachment subsisting at the instance of the present defendants in the suit on and immediately before the 31st December 1868. And consequently, as has already been remarked, if that be the case, the present plaintiff's attachment was within the meaning of section 270, and was indisputably a prior attachment. The plaintiff is therefore in our opinion, upon the facts of the case as stated by the Lower Appellate Court, entitled to recover in this suit. The Moonsiff held that he was so entitled, and the Moonsiff's decision was therefore right, and the Lower Appellate Court's decision was wrong in law. We accordingly reverse the decision of the Lower Appellate Court, and affirm that of the Moonsiff.

The appellant will have his costs in this Court and in the Lower Appellate Court.

The 10th December 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, Louis S. Jackson, F. A. Glover, and C. Pontifex, *Judges*.

Co-sharer—Right of Suit—Cause of Action—Jurisdiction.

Case No. 102 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 23rd September 1872, affirming a decision of the Moonsiff of Deoorajpore, dated the 28th March 1872.

Unnoda Pershad Roy and others (Plaintiffs), *Appellants*,

versus

Messrs. Erskine & Co. (Defendants), *Respondents*.

Baboo Ashootosh Mookerjee for Appellants.

The Advocate-General and *Mr. R. T. Allan* for Respondents.

In a suit brought by one of the shareholders to set aside the sale of property held by several shareholders, in which he made the other co-sharers defendants, but asked to have the possession of his own share, valuing the suit with reference to that share only and framing it so as to bring it in a Court in which he could not have brought a suit to set aside the sale of the entire property:

HELD that plaintiff was not competent to sue in that way. The cause of action was the sale of the whole property, and the suit ought to have been framed and valued accordingly, and brought in such a Court that the rights of all the parties interested in setting aside the sale might be declared in one suit.

This case was referred to the Full Bench on the 2nd September 1873 by Markby and Miller, JJ., with the following remarks:—

Markby, J.—IN this case one Kasheenath Roy sued certain persons whom they describe as "Messrs. Erskine & Co." and eight other persons, alleging that a certain putnee talook was held by seven co-sharers, of which the plaintiff held one share, and certain of the defendants the remainder, each share holder collecting his own share of the rent from the mehal; that defendant No. 1, alleging that he had purchased the zemindaree right over this putnee, had brought a suit before the

llector under Regulation VIII. of 1819, aying for the sale of the putnee talook on count of arrears of rent; and a sale of e putnee talook having been directed, the fendant purchased it himself, and took session; that the plaintiff appealed to the mmissioner, but was unsuccessful; that he, erefore, on the various grounds set forth in e plaint, brought this suit to recover possion of his one-seventh share by setting ide the sale.

The plaint also contained an allegation at the plaintiff was not on good terms with s co-sharers, and that they were acting in llusion with the zemindar.

The suit was valued at Rs. 365, being e value of the plaintiff's one-seventh share.

The whole putnee talook is registered in e plaintiff's name in the zemindar's rishta.

Several other shareholders have filed imilar suits, each in respect of his own hare.

Both the lower Courts have dismissed all he suits on the ground that one suit ought o have been brought by all the co-sharers to et aside the sale, and recover possession of he whole talook.

All the cases are brought up to this Court n special appeal, but only one appeal has een argued (No. 102).

Both the lower Courts in dismissing this uit rely on the decision of E. Jackson and Ainslie, JJ.,* in 7 Bengal Law Reports, Appendix, page 42, and that case appears to us to support the view taken.

On the other hand, in a similar case reported in 14 Weekly Reporter 490, Loch and Mitter, JJ., allowed the holder of a small share to sue alone for and to recover that share.

Under these circumstances, we refer to the Full Bench the question whether one suit by all the shareholders to set aside the sale and to recover possession ought to have been brought, or whether, as the appellant maintains, each shareholder was entitled to sue separately.

Mitter, J.—I concur.

The judgment of the Full Bench was delivered as follows by—

Couch, C.J.—We think that, in deciding this case, we must take the latter part of the question which has been stated by the learned Judges, and take it in connection with what the suit appears to be. We are asked whether, in a suit to set aside the sale of a property held by several shareholders, each of them is entitled to sue separately; but we think we must consider the question as meaning entitled to sue separately in the manner in which the present suit is brought. It is a suit to set aside the sale of the property. It is true that the plaintiff has made the other co-sharers defendants in the suit; but he has asked to have the possession of his own share. Although he may have in terms asked to have the sale set

* The 3rd May 1871.

Present:

The Hon'ble E. Jackson and W. Ainslie, *Judges.*

Cases Nos. 2455 to 2459 of 1870.

Special Appeals from a decision passed by the Subordinate Judge of Mymensingh, dated the 26th August 1870, affirming a decision of the Moonsiff of Bajitpore, dated the 30th December 1869.

Bissonath Bhuttacharjee and others (Plaintiffs), *Appellants,*

versus

The Collector of Mymensingh and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Kashee Kant Sen* for Appellants.

Baboos Unnoda Pershad Banerjee, Juggadanund Mookerjee, and *Nullit Chunder Sen* for Respondents.

Jackson, J.—We think the lower Courts were quite right to refuse to allow these suits to be carried on as they have been instituted. Five plaintiffs, who are co-sharers in a certain tenure, have brought five different suits to recover each their own separate share in that tenure. Independent of the question whether, under such circumstances, each different co-sharer would not be obliged to pay a sufficient stamp covering the whole tenure (which we are inclined to think he would, though we do not directly decide the point), we think the suits cannot be allowed to proceed in this shape. It is very clear that all the parties were ready to bring their suits, inasmuch as they have brought these suits almost at the same time; we believe they have employed the same vakeels—certainly they have employed the same vakeel in this Court, and there seems to be no reason whatever why they should not employ the same vakeel. It is not right that the defendants should be harassed by these five different suits when one suit is sufficient.

It has been thrown out that this has been done in order to remove the jurisdiction from the Subordinate Judge to the Moonsiff. It is immaterial whether it was done with that intention or not; the result is that that is the effect of bringing these suits in the manner in which they have been preferred. As the plaintiffs' vakeel states that he has no objection to their being consolidated into one suit, we direct that they shall be consolidated, and we set aside the order dismissing those suits, and we direct that the cases shall be sent to the Court of the Subordinate Judge, who will take them up as one case, and proceed to trial as if the case had been instituted before him. But, before this order will have effect, we think that the plaintiff is bound to pay into Court all the costs which have been incurred by the defendants up to this date. We therefore allow the plaintiff one month's time to pay into Court all such costs; and, if the money is paid in within that time, this order will stand good; if not, these appeals will be dismissed. Let the costs incurred in this Court be certified to the Court of the Subordinate Judge.

aside, he is, by the valuation of his suit, limited to the setting aside the sale of his own share only. By the framing of the suit in this way, he has brought it in a Court in which he could not have brought it if it had been a suit to set aside the sale as to the entire property. We think he was unable to sue in that way. He has in fact sued in respect of part only of the cause of action, namely, that which applied only to himself. The cause of action was the sale of the whole, and the suit ought to be framed and valued accordingly, and be brought in such a Court that the rights of all the parties interested in setting aside the sale might be declared in one suit. We think the decisions of the Courts below were right, and that the appeal should be dismissed with costs.

The 10th December 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, Louis S. Jackson, F. A. Glover, and C. Pontifex, *Judges*.

Suit for Possession—Plea of Tenancy—Limitation.

Case No. 1151 of 1870.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 23rd March 1870, affirming a decision of the Moonsiff of Madareegunge, dated the 30th June 1869.

Dino Monee Debia (Defendant), *Appellant*,

versus

Doorga Pershad Mojoomdar (Plaintiff), *Respondent*.

Baboos Chunder Madhub Ghose and *Kashee Kant Sen* for Appellant.

Baboos Kalee Mohun Doss and *Nullit Chunder Sen* for Respondent.

In a suit for possession of land brought against a tenant who is really a trespasser, the defendant, merely by alleging tenancy in his written statement, does not preclude himself from setting up the defence of the law of limitation.

This case was referred to the Full Bench by Jackson and Milter, JJ., on the 12th August 1873, with the following remarks:—

Milter, J.—THE plaintiffs in the Court below, now special respondents before us, brought this suit for the possession of certain lands on the allegation that they had been ejected therefrom by the defendants in the year 1269 B. S.

The defendants urged in their written statement that the suit was barred by the Statute of Limitations, and that they were entitled to hold the lands in dispute under a mowrosee lease granted to them by the predecessor of the plaintiffs.

The Court of first instance tried the issue of limitation with the merits of the case and came to the conclusion that the plaintiffs were not entitled to recover.

On appeal the Judge held that the question of limitation could not arise in a case like the present, inasmuch as the defendants had admitted in their written statement that they were the tenants of the plaintiffs, and the case was accordingly sent back to the Court of first instance for further investigation. Subsequent to this order of remand both the Courts below have given a decree to the plaintiffs; but the facts found by the Lower Appellate Court are: *firstly*, that the plaintiffs have failed "to prove their alleged dispossession and previous khas possession," and, *secondly*, that the defendants were mere "*trespassers*," no relation of landlord and tenant having ever existed between them and the plaintiffs.

The questions raised on special appeal are:—

Firstly.—Whether the Lower Appellate Court is right in overruling the plea of limitation upon the grounds set forth in its judgment, and

Secondly.—Whether the finding of that Court on the question of possession is sufficient as it stands to meet the requirements of that plea.

With reference to the first question, I am of opinion that the contention of the special appellants is sound. It is no doubt a correct proposition of law that a tenant is not entitled to plead limitation against his landlord. But this proposition, I apprehend, is applicable to those cases only in which the parties are really related to each other as landlord and tenant. In the present case the Judge has found as a fact that there was no such relation between the parties; and it follows therefore that he has applied the law of landlord and tenant to a case which, according to his own finding, is not a case of landlord and tenant at all.

It has been argued that the defendants have deliberately placed themselves in the position of tenants; and as a tenant is

t entitled to plead limitation against his adlord, the Court cannot allow the defendts to take up a plea which is inconsistent th the position they have voluntarily umed. I am of opinion that this argument is not sound.

In the first place it is not very clear ether the doctrine of estoppel by pleading applicable to cases in this country. But, thout entering into this question, I think may safely affirm that we have got no ch things as pleadings technically so lled. The written statements filed in our urts are not pleadings in the strict sense of e term. Section 123 of the Code of Civil ocedure lays down what a written statent should contain, and it says in so many rds that "written statements should not by way of answer one to the other." hen again section 139 enacts that it is r *the Court to lay down "all the issues f law and fact upon which the right determination of the case may depend;"* and it rther says that "the Court may frame e issues from the allegations of fact which collects from the parties or their pleaders, *notwithstanding any difference between such allegations of fact and the allegations of fact contained in the written statements*, if ny, tendered by the parties or their pleaders." These provisions not only show that pleadings strictly so called are unknown to our Code, but also and specially that an allegation of fact made in a written statement is not by itself absolutely binding against the maker.

But, if the doctrine of estoppel by pleading is not applicable to this case, there seems to be no other doctrine or principle of law upon which the plaintiffs can take their stand. An admission deliberately made by a party is certainly admissible as evidence against himself. But, if we once treat the admission of the defendants in this case as a mere matter of evidence, the argument of the plaintiffs must fall to the ground. An allegation of fact which is found to be untrue must be treated *as such* for all the purposes of the suit, inasmuch as it would be obviously illogical and unsound to make one and the same decision depend upon two states of facts diametrically opposite to each other. If we decide as a matter of fact that the defendants were trespassers, we cannot, in the same case, overrule the plea of limitation upon the assumption of a quite different state of facts, namely, that the defendants were the tenants of the plaintiffs. If the plaintiffs can say to the defendants that they, the defendants, cannot be permitted to blow hot and cold by taking up a plea which is inconsistent with the case relied upon by them, the defendants also can say to the plaintiffs with equal reason that they, the plaintiffs, should not be permitted to blow hot and cold by getting rid of the plea of limitation upon the ground of a supposed tenancy which has never existed in fact, and which they themselves have been repudiating throughout, inasmuch as their case was that the defendants have been holding possession as trespassers. Neither of the parties can complain that their status has been altered or affected in any manner by the false allegations of fact put forward by their adversaries, and I do not therefore find any reason why any of those allegations should be used as an estoppel against either of them in any sense of the term.

It has been said that the question of limitation cannot possibly arise in a case like the present, until it is determined that there is no relation of landlord and tenant between the parties; and, as the issues must be laid down before the case is heard on the merits, no issue of limitation could be laid down by anticipation. This argument is not, in my opinion, entitled to any weight. It is the duty of the Court to lay down all the issues of law and fact upon which the right determination of the case depends, and those issues or such of them as would be sufficient for such determination must be determined in the most rational order which the circumstances of the case will permit. There is no law that I am aware of which says that the issue of limitation must, in every case, be invariably tried at a particular stage of the trial, or that no such issue ought to be laid down if it is found that its determination would depend upon the previous determination of the other issues involved in the case or of any particular class of them. Suppose, for instance, that a suit is brought to recover property from the hands of an alleged trustee. The defendant denies the trust, but, at the same time, relies upon the ordinary rule of limitation in his defence. Can it be said that the issue as to whether the suit is barred by the ordinary rule of limitation or not, ought not to be laid down in such a case, because the occasion for determining that issue would not arise until it is determined that the case is not a case of trust at all?

It may be said that, in the case supposed, there is no inconsistency between the issue of limitation and the case set up by the

defendant upon the merits. But I have already disposed of this last-mentioned objection, and I have referred to the above illustration simply for the purpose of showing that the argument based upon the supposed difficulty of laying down the issue of limitation in a case like the present is not, by itself, of any weight whatever.

It may be urged that the defendants ought not to be permitted to fall back upon the Statute of Limitations after they have failed to substantiate the false defence which they have been foolish enough to set up. But the Court has no power to inflict any penalty of this kind, unless it is authorized to do so by an express legislative enactment. This point has, I believe, been finally set at rest by the decision of the Privy Council in the case of Ranee Surnomoyee *vs.* Raja Suteesh Chunder Roy,* so that I have simply to add that, if the defendants are to be visited with such a penalty, there seems to be no reason why some similar penalty should not be inflicted upon the plaintiffs for having falsely alleged in their plaint that they had been dispossessed by the defendants in the year 1269 B.S.

Let us suppose for one moment that the plaintiffs had come forward with an allegation in their plaint that they had been dispossessed by the defendants (a party of trespassers) on a date more than 12 years previous to the institution of this suit. Such a claim would be barred by limitation on the very face of it, and the Court would be bound, under the provisions of the 32nd section of the Code of Civil Procedure, to reject it upon that ground without even summoning the defendants. But, if the subsequent appearance of the defendants with a false allegation of tenancy could save the plaintiffs from the consequences of their own laches, such rejection of their claim would be not only premature but unjust; and hence it follows that, in the case supposed, the fate of the plaintiffs' claim would be precisely the same, whether its liability to be dismissed on the ground of limitation is discovered before or after the appearance of the defendants. How, then, can it be said that the law of limitation would not apply to this case, if the defendants have been *de facto* in possession for a period of more than 12 years prior to the date of suit, not as tenants, but as the Judge himself has found as "*trespassers.*" The defendants have not been allowed to derive any benefit whatever from their allegation of tenancy, and, if the cau of action of the plaintiffs had really accrue more than 12 years prior to the date of th suit, it would be manifestly unfair to allo them to derive any benefit either from th false allegation of tenancy set up by th defendants, or from the equally false allega tion which they themselves have put forwar in their plaint with reference to the date o their dispossession; particularly when it i borne in mind that, if they had candidly admitted in that document that they had bee dispossessed more than 12 years prior to it presentation, the Court would have bee bound to dismiss their claim on the ground of limitation, without even waiting for th defendants. So far as falsehood is concerned both the parties are equally guilty, if th Judge's findings are correct; and as th Court is bound to base all its conclusions upon a true and not upon a false state o facts, there seems to be no reason why the statutory bar should not prevail, if it is really applicable to the actual facts of the case. Every suit must be brought upon a certain cause of action, and it must be further shown that the cause of action is not barred by lapse of time. I do not mean for one moment to say that a plaintiff is bound to prove the precise date of his cause of action as alleged in the plaint; but he is, in my opinion, clearly bound to show, when required, that the cause of action has not been extinguished by operation of time. The only case in which the view taken by me might appear to be heard is that in which there is not only an admission in the written statement of the defendant that he was the tenant of the plaintiff, but in which it is also found that the defendant has been avowedly claiming to hold as a tenant throughout the entire period of his possession. But the present case stands upon a quite different footing. The plaintiffs have neither alleged nor proved that this was the real state of things, and as for the defendants, their allegations have been found by the Judge to be untrue. But, be this as it may, there seems to be no reason why the law of limitation should not apply even to a case like the above. Whether the defendant did, at any time during the period of his possession, acknowledge that possession to be the possession of a tenant or not, it seems to be pretty clear that no such acknowledgment can stop the operation of the law of limitation. The plaintiff's cause of action remains the same. That cause of action originated in a wrongful act of dispossession by the defendant, and no pretended title of

* 2 W. R. (P. C.) 13.

ancy set up by the latter can alter either nature or the date of that dispossession, convert the case into one of landlord and ant, when in point of fact there was no ch relation between the parties. The intiffs might have and ought to have sued on their cause of action within the period escribed by the statute, or they might have an end to the dispute by accepting the fendants as their tenant. But, in the sence of such acceptance, the case must dealt with throughout as a case against a spasser, and not as a case between a land- rd and tenant.

Much stress has been laid by the respond- nts upon a decision passed by a Division nch of this Court, which is reported in age 398 of the 7th volume of the Weekly eporter. But, for the reasons above stated, am unable to concur with the learned dges by whom that decision was passed, nd I would therefore refer the question to a ull Bench for an authoritative decision.

With reference to the second question aised in this special appeal, I am of opinion nat the Judge's finding on the point of ossession is not sufficient to meet the equirements of the issue of limitation. The plaintiffs might have failed to prove the recise date of dispossession alleged in their laint, and they might have also failed to rove their khas possession immediately revious to that date. But it still remains o be seen whether the plaintiffs were in possession, either actual or constructive, at ny time within 12 years prior to the insti- ution of this suit. I would therefore remand his case to the Lower Appellate Court for a fresh trial of the issue of limitation, subject o the opinion of the Full Bench on the following point, namely, whether, in a suit for possession of land brought against a defendant who is really a trespasser, but who has set up a false case of tenancy, the issue of limitation can be raised and determined.

Jackson, J.—I concur in the order of reference to the Full Bench. The effect of the decision appealed against, as it stands, is that the defendants are found, as a fact, to have held the land in dispute as trespassers, that is, adversely to the plaintiffs, but, because they have alleged themselves to have been tenants of the plaintiffs, they are debarred from setting up the plea of limitation. This view is supported by the case in 7 Weekly Reporter, page 398, which has been referred to by Mr. Justice Mitter. In that case the learned Judges observe that, by admitting the right of the plaintiff as the owner of the land in dispute, and acknowledging himself to be the plaintiff's tenant, the defendant precludes himself from pleading adverse possession or limitation. It seems to me that a fallacy lurks in those words, because the question is not so much whether the defendant is to be permitted to set up a plea under the law of limitation, as whether the Court is to apply that law to the facts which may be found. It seems necessary therefore that this point should be authoritatively settled.

The judgment of the Full Bench was delivered as follows by—

Couch, C.J.—The question which is referred to the Full Bench is whether, in a suit for possession of land brought against a tenant who is really a trespasser, the defendant setting up a false case of tenancy, the issue of limitation can be raised and determined. And the terms in which the question for the Court has been framed is illustrated by the facts as stated in the judgment of Mr. Justice Mitter.

The defendants in their written statement alleged that the suit was barred by the law of limitation. They also alleged that they were entitled to hold the lands in dispute under a mowrosee lease granted to them by the predecessor of the plaintiffs. They may have honestly believed that this was the fact, and that such a lease had been granted. They may have failed to prove it, and, in fact, according to the finding of the lower Courts, they did fail. I think a written statement putting forward a defence in this manner ought not to be treated as a conclusive admission by the defendants that the facts are as they allege, if the plaintiff denies the truth of the written satement, and has an issue raised upon the allegation. If he had accepted the written statement, and the case had been tried upon the admission so made, it would have been proper for the Courts to consider as the true state of things that there was a tenancy between the parties. Of course, if there was a tenancy, the law of limitation would not apply. But here the plaintiffs did not accept the statement of the defendants as to the tenancy. They denied it, and they succeed in disproving it. And although the plaintiffs have done that, and have shown that it is not the true state of things, the Courts have given effect to the admission as if it was true, and have said that the law of limitation shall not apply to the case. If the tenancy is to be taken to be the true state of things as proved by the

admission, and not contradicted by the other party, I think the law of limitation will not apply. If this was intended to be decided in the cases referred to, I concur in those decisions. But here the question really is this: Is a defendant to be prevented from setting up the defence that there is a tenancy, and, at the same time, relying upon the law of limitation, if the facts should prove to be such as will support that defence? I think that, in many cases, it would be productive of the greatest hardship if the defendant was obliged to relinquish the defence of the law of limitation, where he might really have it, in order to be able to say, I believe that I can prove a tenancy between the plaintiff and myself, and I desire to rely upon that. I think we ought to hold that, merely by alleging the tenancy in his written statement, he does not preclude himself from setting up the defence of the law of limitation. Whether there is that defence to the suit, ought to be determined upon what the facts are proved to be, if the plaintiff resolves to have them inquired into, as was the case here.

Kemp, J.—I concur. I wish only to add that the defendants, in their written statement which I have referred to in the original, set up a mowrosee holding with reference to some of the plots of the land for which the suit was brought, and with reference to other plots they set up an independent title, claiming them as belonging to another talook than that of the plaintiff.

Jackson, J.—I concur with the learned Chief Justice.

Glover, J.—I concur.

Pontifex, J.—I concur.

The 11th December 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Costs—Form of Decree—Act VIII. of 1859, s. 360.

Cases Nos. 285 to 287 of 1873.

Miscellaneous Appeals from an order passed by the Subordinate Judge of Mymensingh, dated the 9th August 1873.

Rajah Raj Krishno Singh Bahadoor (Judgment-debtor), *Appellant,*

versus

Pranoda Dabee Raj Coomaree and others (Decree-holders), *Respondents.*

Baboo Rash Behary Ghose for Appellant.

Baboos Sreenath Doss, Nil Madhub and *Bykunt Nath Doss* for Respondents.

Where a decree of the High Court awards costs, order is not bad in law, simply because it does not cify the exact amount to be paid as costs of the Court. Such specification is not rendered incumbent Act VIII. of 1859, s. 360, which only requires a Court appeal to declare the proportions in which the costs to be paid where more parties than one are made li

Glover, J.—One order will govern these cases. The question is one of co It appears that the appellant Rajah brou a suit for possession of certain lands, wh suit, after gaining in the first Court, he l in the Court of appeal. The order in t Court, after declaring the other parties' rig to succeed to the land, was that the Ra should pay all the costs of the app amounting to a certain sum named, then the costs in the original Court, not nam any sum, and likewise the costs of remand. The latter were occasioned by High Court having sent down, pending trial of the appeal, certain issues to t lower Court under section 355 adjudication, and the costs of rema referred to those costs.

It is now said that the decree-holders only entitled to the sum of money speci cally named in the High Court's decree f costs, and that they cannot have the costs the first Court nor the costs of the remand the 1st, because the amount is not specified and the 2nd, because such remand-costs, they come in under any head at all, would come under the head of costs of the appeal, and that these have not been allowed beyond the sum of Rs. 1,078 fixed by the decree.

We think these objections are not tenable. The High Court's decree is perfectly clear as to what it means to give, and there is nothing in the law which makes that order for costs bad, simply because it does not specify the exact sum to be paid as costs of the lower Court. Very probably the means of ascertaining that exact sum were not in the possession of the Court at the time the decree was drawn, but it can now be easily ascertained, on referring to the record, what was the amount spent by the respondents in the Court of first instance. Section 360 of Act VIII. of 1859, on which the pleader for the appellant relies, refers to cases where there are more parties than one made liable for costs, which necessitates the fixing by the Court of appeal of the proportion in which the costs are to be paid. Here the judgment-debtor was one person only, and the

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no doubt that the order of the Court was he was to pay the whole of the costs. ere is nothing in section 360 to make it cumbent on a Court of appeal to specify amount of the costs incurred in the first rt; it has only to declare the proportions which they are to be paid.

As to the costs of remand, the High rt's decree is perfectly clear. It declares t, besides the costs of the appeal and the ts in the original Court, the defendants to have the costs of the remand. It es not matter whether these costs were luded or not in the appeal-costs. We e only to see whether the order for these ts is clear; and if it is clear, whether it is cording to law.

Then there is another objection to the ct that the two daughters of the plaint-'s uncle and his widow, against whom the t was brought, put in separate defences, d engaged separate pleaders, whereas their fence was substantially the same, and that e Court ought not to have allowed them parate sets of costs. This is a matter yond our power to look into now. The igh Court in the exercise of its discretion hose to give the whole of the costs, and hese of course included the whole of the osts that these defendants actually incurred.

The appeals are dismissed with costs. leader's fees, 3 gold mohurs for the three ases.

The 15th December 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Fœre Naturæ—Right of Property.

Case No. 1 of 1873.

Regular Appeal from a decision passed by the Judge of Sylhet, dated the 26th September 1872.

Chytun Churn Doss and others (Plaintiffs), *Appellants,*

versus

The Collector of Sylhet on behalf of Government (Defendant), *Respondent.*

Baboo Grish Chunder Ghose for Appellants.

Baboo Unnoda Pershad Banerjee for Respondent.

Wild animals are no longer the property of a man than while they continue in his keeping or actual possession; but, if they regain their natural liberty, his property ceases unless they have a mind to return, which is only to be known by their usual custom of returning, or are instantly pursued by their owner, for during such pursuit his property remains.

Kemp, J.—THE plaintiff is the appellant in this case. The suit is to recover a female elephant, namely, *mealee*, or failing the same, the value thereof, Rs. 2,000.

The plaintiff alleges that this elephant was purchased by his gomashta in the month of Falgoon 1270, and that he tamed and trained her to work, and owned and held possession of her; that subsequently, in Bhadro 1276, the elephant fled into the jungle; that the plaintiff made diligent search for her, and caused her loss to be reported at the sudder police station of the district of Cachar, and continued the search; that subsequently he was given to understand that the said elephant was caught in the month of Cheyt 1277 at the Government Kheddah at Singla Oojjân; that he then made an application to the Superintendent of Kheddahs for the restoration of this elephant, but that the Superintendent, without instituting any proper inquiry, and without receiving evidence, rejected his application on the 6th of May 1871. That rejection forms the plaintiff's cause of action. A description of the elephant is given at the foot of the plaint.

The answer of the Collector of Sylhet on behalf of Government is briefly to the following effect: *1st*, that the elephant in dispute does not belong to the plaintiff; *2nd*, that the description of the elephant given in the plaintiff's applications to the Superintendent of Kheddahs was not recorded in the diary of the thannah, and that the marks indicated in the said petitions do not agree with those borne by the elephant.

Then a point of law is raised that "even "if, for the sake of argument, it be conceded "that the elephant in suit is the same that "the plaintiff alleges to have lost, still it is "quite clear that the said elephant returned "to its wild nature, and was in its natural "wild state when caught; that it was, under "the circumstances, undoubtedly the pro-"perty of the person who captured it; and "that whatever right the plaintiff had held "in the elephant in question ceased to exist "when it returned to its natural independent "state and wild nature." And, lastly, that the plaintiff cannot recover the said elephant until he has paid in full the expenses incurred by Government in capturing and in keeping it, amounting up to date of suit to Rs. 1,080-2-11.

The Judge of Sylhet has dismissed the

plaintiff's case on two grounds : 1st, that he has failed to satisfy the Judge that the animal which he now claims is the same animal which the plaintiff purchased, and subsequently lost in the year 1276; and, 2ndly, on the point of law, the Judge, quoting from Stephen's Commentaries on Blackstone, Volume II., page 6, is of opinion that the plaintiff was not entitled, even if he had established the identity of the animal in dispute, to recover her.

In this case it is admitted that the plaintiff purchased a female elephant in 1270. He appears to have kept this elephant until Bhadro 1276, using it for the purpose of dragging logs of wood; it does not appear that it was ever used as a sowaree or riding elephant, and evidently it was in a semi-wild state, used for the above purpose only. Then it is alleged that, in Bhadro 1276, this elephant was missing from the custody of Bhola Mahoot, who, we may observe, has not been examined in this case. We do not find that the plaintiff gave any intimation of his loss to the police *immediately* on the loss of the animal, the first intimation given to the police being dated the 12th of Assin 1276, or some time after the alleged loss. In this intimation no distinguishing marks by which the elephant could be recognized were given, all that was stated was that a koonkee elephant, height 6¾ feet, was missing. This is all the plaintiff appears to have done towards any pursuit of his elephant, or towards recovering it. Subsequently it is admitted that the Government captured two wild female elephants and a calf in the kheddah at Singla Oojjân, and upon this the plaintiff applied to the Superintendent of Kheddahs claiming one of these female elephants as the animal he had lost. In these petitions to the Superintendent of Kheddahs, dated respectively the 21st and the 22nd of Cheyt, certain marks are given, namely, a dry scar on the back of the elephant, a certain peculiar formation of the nails of the two hind feet, and then it is said that the tail was complete and full. Strange to say in these two petitions the height of the elephant is not given; this is somewhat significant, as the elephant captured by Government is 7 feet in height, and the elephant lost by the plaintiff is given in the diary of the thannah as 6¾ feet; probably the plaintiff did not like to give the height of the animal until his witnesses were prepared to identify the animal now in dispute. Several witnesses have been examined by the plaintiff and we concur with the Judge, after hearing the whole evidence read, in rejecting the t timony of these witnesses as unsatisfact

Then, with reference to the law point, i clear, with reference to the passage quot by the Judge, that this animal was origin *fœre naturæ*: "Such animals are no lon "the property of a man than while th "continue in his keeping or actual possessi "but, if at any time, they regain their natu "liberty, his property instantly ceases, unl "they have *animum revertendi*, which "only to be known by their usual custom "returning, or unless instantly pursued "the owner, for during such pursuit "property remains." Now, as already show nothing was done by the plaintiff in t matter of pursuing his missing elepha Therefore, on the point of law, as well upon the unsatisfactory nature of the e dence as to the identification of the anim now claimed, we concur with the Judge, a dismiss this appeal with costs payable b the appellant.

The 19th December 1873.

Present :

The Hon'ble W. Ainslie, *Judge.*

Act VIII. of 1859, ss. 128, 129, 132—Documentary Evidence—Procedure.

Case No. 1432 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 8th April 1873, reversing a decision of the Moonsiff of Muksoodpore, dated the 31st January 1872.

Tumeezooddy (Plaintiff), *Appellant,*

versus

Busarut (one of the Defendants), *Respondent.*

Baboos Nil Madhub Bose and *Jadub Chunder Seal* for Appellant.

Baboo Bungsheedhur Sen for Respondent.

At the stage of a suit referred to in Act VIII. of 1859, ss. 128, 129, and 132, the Court ought to sort the documents tendered into two classes : those relevant and admissible, and those irrelevant and inadmissible; and to reject *in limine* all documents which are evidently such as cannot be used as evidence in the suit. The admission of a document at this stage does not imply that it is evidence, but merely declares that *it may, if properly treated,* be used as evidence in the suit; and filing it as a part of the record does not confer any authority on such document, or operate to dispense with any proof of genuineness.

Courts of first instance ought to specify what portions the documentary evidence on the record they have accepted, and what portions they have refused to listen to.

All the proceedings of the parties in respect of the production of documentary evidence are matters to be recorded in the proceedings of the Court by the Judge's own note.

In this case the plaintiff, as landlord, sues to eject the defendant, alleging that he was formerly his tenant, but that he has disclaimed and thereby forfeited his tenancy. In 1252, the Government settled certain resumed tenure with one Mussamut Hur Monee, and she, in 1260, gave a mowrusee sub-lease of this tenure to Kristo Dhon. Within this tenure, Morad Ali, the father of the defendant, and other persons, held a khemee ryotee jote. It is alleged that in 1855 this jote was sold to one Komurooddeen, who got himself registered as tenant of Kristo Dhon, and that in this way the rights of Morad Ali became extinct. The plaintiff further says that Komurooddeen created a new tenure in favour of one Sonaoollah in 1856, which is now held by the defendant, and it is on a disclaimer of this that the present suit is founded.

The defendant alleges that Hur Monee had only the interest of a Hindoo widow, and he denies absolutely the transaction set up by the plaintiff, and claims to hold as successor to Morad Ali. He states that he received in 1268 a lease from the reversionary heirs of Eshan Chunder Thakoorta, the husband of Hur Monee; but apparently he treats this as merely confirmatory of his previous tenure. The Subordinate Judge has dismissed the suit on three grounds: *Firstly*, he says that Ausurooddeen, under whom the plaintiff claims, was not competent to create a title superior to his own; *secondly*, that, even if there was any sale by Morad Ali, the entire jote was not thereby conveyed to Komurooddeen, but only a part of it, and the plaintiff, a single shareholder, is not competent to oust the defendant, a tenant of the joint property; and, *thirdly*, he says that the plaintiff has altogether failed to prove the kobala alleged to have been executed in favour of his predecessor by the defendant's father.

All these points have been objected to in special appeal, and I think that the first and the second objections must prevail. It may be that Ausurooddeen attempted to create for plaintiff a title superior to his own, but, at any rate, he conveyed to plaintiff as much as he held himself, and thereby gave him a sufficient title to enable him to maintain this suit. Then, as to the second point, it has been pointed out that there was documentary evidence offered by plaintiff to show that the entire kyemee jote came into the hands of Komurooddeen, and that this has not been noticed by the Subordinate Judge.

On this part of the case, very considerable doubt arises as to how the documentary evidence offered by the plaintiff was dealt with by the first Court, whether it was challenged or not by the opposite party, and whether the first Court dealt with it as evidence in the suit. I think that the appeal must fail on the third ground, otherwise it would have been necessary to remand the case, because it seems to me that the second objection raised by the Lower Appellate Court came upon the plaintiff as a surprise, and he ought to have an opportunity of establishing his case by giving proof of the two documents upon which he relies to complete his title. This Court has commented *ad nauseam* on the manner in which Courts of first instance receive and deal with documentary evidence. Sections 128, 129, and 132 of the Code of Civil Procedure do not make every document which is admitted under them good evidence in the suit. What the Court does or ought to do at the stage of a suit referred to in those sections is to sort the documents tendered into two classes—those relevant and admissible, and those irrelevant and inadmissible (*e. g.*, for want of registration where the law requires registration, &c). This has been distinctly pointed out in this Court's Circular Order No. 9 of the 26th February 1867,* to which attention was again called by Circular Order No. 12 of 3rd December 1869.† It is the duty of the Courts (one unfortunately systematically neglected) to reject *in limine* all documents which, on inspection, are evidently such as cannot be used as evidence in the suit in which they are tendered, but it must not be supposed that, by the admission of a document at this early stage, any declaration is made to the effect that it is evidence; this admission goes no further than to declare that it *may be, if properly treated*, used as evidence in the suit. The law, section 132, says that the admitted documents are to be filed as part of the record. This filing does not confer on them any authority, or operate to dispense with any proof of genuineness. Although a document which does not prove itself under the Evidence Act has been placed on the record, the

* 4 W. R., Civil Cirs. 4.
† 12 W. R., Civil Cirs. 11.

Court is not authorized to use it, or to allow it to be used without proof, except with the consent of the opposite party. If the party who places a document on the record neglects to prove it, or fails in his attempt to prove it, that exhibit is no evidence, and the Court ought to make a distinct note of the fact. There is no provision in the Civil Procedure Code for the purgation of the record by directing the withdrawal of all documents requiring proof which have not been proved; this makes it the more incumbent on the Courts of first instance to specify with exactness what portions of the documentary evidence on the record (the evidence tendered having been first weeded under section 129) they have accepted as established by proof or by consent, or as requiring no formal proof, and what portions they have refused to listen to for want of proof. Unless this is done, the Appellate Courts can never know with certainty what the true state of the record is, and whether it has been properly made up. It is the duty of the Court to see that the documents which the pleaders propose to use are properly proved, or that proof is by law or consent dispensed with. All the proceedings of the parties in respect of the use of documentary evidence are matters to be entered on the proceedings of the Court quite as much as their proceedings in respect of procuring the attendance and examination of witnesses, the compulsory production of documents, &c.; the only difference is that the latter are recorded by petition and order, and the former must be recorded by the Judge's own note. A Judge who does not make this note simply leaves his records incomplete; it is not fair to the parties or to the Courts that may have to deal with the suit in appeal that the record should be left thus imperfect, and a Judge who is negligent in this matter fails in a very important part of his duties.

Then, as to the third ground of the decision of the Lower Appellate Court, it is said that the Subordinate Judge ought to have found that the conveyance by Morad Ali was proved, and that he has overlooked the evidence of possession and of payment and receipt of rent. The evidence of Ausurooddeen is relied upon as showing that the conveyance, which is a registered document of old date, came from proper custody; but this document is not of sufficient age to entitle the appellant to the presumption which attaches to ancient documents; and although possession might by itself constitute title, and is certainly in connection with evidence of title strongly corroborative of that evidence, it cannot, in the absence of such evidence, est lish the source in which the possession o ginated. It cannot therefore be said t there was any proof of the actual title set which the Subordinate Judge was bound notice, and which he has overlooked. E if these documents were accepted, the le to Sonaoollah is not established, and the su cession of the defendant to Sonaoollah is n made out.

It was lastly contended that the defenda admits holding the jote of Morad within th jumma settled with Hur Monee; that there evidence to show that Kristo Dhon hel under Hur Monee, and that Komurooddee and Ausurooddeen held under Kristo Dho and plaintiff under Ausurooddeen; and there fore, if Morad Ali was a ryot of Hur Mone the defendant, by these series of transfe became the ryot of the plaintiff, and conse quently became liable to ejectment on di claimer of holding under plaintiff. All thi however, was not stated in the plaint. Wha the plaintiff there alleged and undertook to prove was that he himself now represents Morad; that the intermediate representative of Morad created a new tenure in favour of Sonaoollah; and that, in respect of that new tenure, the defendant incurred his liability. There is no allegation whatever that the old tenure of Morad continues to exist in the hands of the defendant, and that the plaintiff derives title from Hur Monee. The case was so framed that it met by anticipation the defence which was actually set up that Hur Monee had only a life-interest; for the plaintiff carries his title back to a kyemee jote which was apparently as old as, or older than, Hur Monee's title; and although he sets up a recognition of his rights by Kristo Dhon, this is merely as a confirmation of an existing right, and not as the creation of a new tenure; he must stand by the allegations of his plaint. The plaintiff relying upon Sonaoollah's kubooleut might have framed his plaint in the alternative. He might have claimed under the kyemee right of Morad Ali, or, on failure of that, under the new tenure created in his favour by Kristo Dhon; but he now not only seeks to set out his own title in the alternative, but also attempts to state the nature of the defendant's holding in the alternative, *viz.*, that it is either the old tenure of Morad or the new tenure of Sonaoollah.

This double alternative involves a contradiction. In one place the plaintiff says I hold Morad's jote; in another he says defendant holds it. In one he says defendant holds under

e as successor to Sonaoollah; in another, at defendant holds under me independently Sonaoollah. Alternative statements which volve contradictions are inadmissible; for is impossible for a defendant to know at case he has to meet, and therefore the ound now taken cannot be maintained.

This appeal must be dismissed with costs.

The 7th August 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Magistrate's Award—Act XXV. of 1861, s. 318—Possession—Limitation—Onus Probandi—Thakbust Proceedings—Jurisdiction—Regulation VII. of 1822.

Case No. 1286 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 7th June 1872, reversing a decision of the Subordinate Judge of that District, dated the 12th September 1871.

Kalee Narain Bose and others (Defendants), *Appellants,*

versus

Anund Moyee Goopta and others (Plaintiffs), *Respondents.*

Mr. J. T. Woodroffe and *Baboos Kalee Mohun Doss* and *Doorga Mohun Doss* for Appellants.

Baboos Unnoda Pershad Banerjee, Sreenath Doss, and *Romesh Chunder Mitter* for Respondents.

An award of a Magistrate, under Act XXV. of 1861, s. 318, cannot be set aside by a decree of the Civil Court for possession; but is by terms good to retain the party in whose favour it is passed in possession of the land until the opposite party has established his right thereto by civil suit.

When limitation is set up in answer to a suit for possession, it does not lie upon the defendant to disprove plaintiff's possession; but it is the duty of the plaintiff to show that he has been in possession within twelve years before the commencement of the suit.

Where a survey is once concluded, the map completed, and the thakbust proceedings brought to a close, a Deputy Collector has no authority to re-open the proceedings; and if he does so on the application of one party, and issues a notice to the opposite party, the latter is not bound to appear.

Jackson, J.—The present suit was brought for the purpose of recovering possession of a considerable area of land which the plaintiffs divided into four parts or plots, as to the boundaries of which there has been a certain amount of discussion. The land was claimed as belonging by re-formation on original sites to the plaintiffs, and as falling within the boundaries which the plaintiffs have assigned to the four different portions of this land.

The defendants pleaded limitation, and also denied that the plaintiffs had any right whatever to the land which the defendants alleged appertained to their estate.

The Subordinate Judge of Dacca, Moulvie Nazeerooddeen Mahomed, an officer of great experience and excellent judgment, decided in favour of the defendants on both the issues. The plaintiffs appealed, and the decision of the first Court has been reversed, except as to a small portion of the land claimed, by the Officiating Judge of Dacca, Mr. Garrett.

The defendants have come up here in special appeal. The case of the plaintiffs was one which imposed upon them a peculiar difficulty. The defendants were in possession of the land in dispute under an award of the Magistrate under section 318 of the repealed Code of Criminal Procedure, and under this circumstance the burden was strictly upon the plaintiffs to prove that, notwithstanding the Magistrate's finding as to possession, they were entitled to the land. The Officiating Judge does not appear to have referred to that circumstance, and we may remark in passing that he has mistakenly supposed that, in giving plaintiffs a decree, he sets aside or could set aside the award of the Magistrate. That award is by terms good to retain the party, in whose favour it is passed, in possession of the land, until the opposite party has established his right thereto by civil suit. The Officiating Judge, it is plain, has taken considerable pains in dealing with the case, and it is matter of lament that we should be unable to affirm a judgment on which he has taken

so much trouble. The first question which he had to deal with is limitation. The defendants denied that, at any time within twelve years before the commencement of this suit, the plaintiffs had exercised any right of ownership on the land. The way in which the Judge deals with this question is this. He says: "The Subordinate Judge has "framed an issue, which he has decided in "favour of the defendants, that the plaintiff "has not been in possession of the disputed "land within the last twelve years, and he is "therefore of opinion that the suit is barred "by limitation. Now, limitation can only "accrue when it is perfectly clear either "that the claimant was *not* in possession, or "that some other person was in possession. "In the present case, it cannot be said that "any negative proof has been exhibited, and "therefore the decision of the Subordinate "Judge is tantamount to finding that the "defendants have been in possession of the "disputed land for the last twelve years." And further on he says, after adverting to the evidence which the defendants gave: "I "certainly cannot see in this any such proof "of possession by the defendants as would "justify us in barring the suit." It is manifest, therefore, that the Officiating Judge is of opinion that, when limitation is set up, it lies upon the defendant to disprove the plaintiff's possession, instead of its being the duty of the plaintiff, as has been repeatedly pointed out both by the Judicial Committee of the Privy Council and by this Court, to show that he has been in possession within twelve years before the commencement of the suit. The last case in which this has been pointed out is in 19 Weekly Reporter, page 182. Clearly, therefore, the mistaken view which the Judge has taken of this question has entirely vitiated his view of the evidence. It is impossible to say whether, if he had understood the burthen of proof being upon the plaintiffs instead of upon the defendants, he would have come to the same conclusion that he has come to in this matter.

The next point to which it is necessary to advert is the dealing by the Judge with a most important portion of the plaintiff's case, *viz.*, the thakbust proceedings on which it may be said the plaintiffs very chiefly relied. In the first place, whereas the Judge puts the whole land together on the same footing, it is quite clear that the thak map and the proceedings, as far as they are cogent proof against the defendants, are so only in respect of plots 2, 3, and 4, because it is only those portions of the land in dispute wh were demarcated in 1859 as portions of plaintiffs' villages. As to plot 1, that demarcated in Cheyt 1264 (correspond with March and April 1858) more t twelve years before the suit began, as bein portion of the defendants' property Murri putty. It is true that subsequent proce ings took place before the thakbust Dep Collector to which we shall presently adv but, even in respect of plots 2, 3, and 4 seems to us that the Judge has given thakbust proceedings an importance bey what they were entitled to. The Judge several passages of his judgment cle shows that he has misconceived what real issue in this case was. He appear think that, so long as the plaintiffs succeed identifying the land in dispute with land which was thaked at the time of survey, that is, in 1859, with the plainti villages, the plaintiffs have made out all t they were bound to prove. In point of f however, the thak maps and proceedings 1859 were at best only evidence; they co not conclude the defendant, and of cou the weight, whatever it might be, which w due to the thakbust inquiries, has been this case very greatly impaired by t fact that, since the thak took place, th has been at least one diluvion and alluvi of the land in dispute. But the Jud extends the value of the thak evidence the first plot of land on the ground of c tain proceedings which took place befo the Deputy Collector Baboo Brojo Soond Mitter in May 1859. It seems that, aft the thak was completed, an application w made by the plaintiffs or the parties who they represent, stating that the bounda between their villages and the defendan village Murrichputty had been wrong shown in the map, and the Deputy Collect seems to have made some inquiry, an recorded a proceeding to the effect that the usual notice had been issued, but that the opposite party did not appear; that he proceeded to the spot, and found that greater part of the land was under water and the rest fallow, but that, from the inquiries he made, he was satisfied that the land was identical with the land which the plaintiffs had previously decreed to them in 1842 in the resumption-proceedings, and that consequently they were entitled to the alteration sought. This proceeding of the Deputy Collector was *ultra vires*. This survey once concluded, the map completed, and the proceedings brought to a close, we are not

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are that he had authority under Regulation VII. of 1822, after the lapse of two or three or ten years, to re-open the proceedings, and make any alterations which he thought fit. In addition to this, the inquiry was held behind the back of the defendants. We decline to accept the statement in the Deputy Collector's roobakaree that the notice was served on the defendants, but, even if it were served, we must hold that they were not bound to appear. Finally, the order of the Deputy Collector proceeded, not upon possession but upon inquiry into title, which was a matter entirely within the province of the Civil Court. It seems to us that the proceedings of the Deputy Collector in 1859 were in no sense binding, and ought not to be taken into consideration. As far as we are able to come to an opinion, we are inclined to think that view of the Subordinate Judge that the so-called proceedings of the thak office were altogether collusive is the correct view. We have already stated that the Judge has tried the case chiefly upon a wrong issue. The real question was whether the land in dispute was such as that the plaintiffs were entitled thereto by reason of re-formation on the original site. There are several points bearing upon this issue in which the Lower Appellate Court has misdealt with the evidence. There is, in the first place, a suit the proceedings in which have been made use of by the Judge against the defendants. The plaint shows that suit to have been brought by one of the defendants against one Kali Kant Sen. The Judge says: "The present "defendants sued this Kali Kant Sen to "recover certain lands, and they described the "west boundary of those lands as the *nij "poyasti zemin jaha Mozoomdare thak mokuddumay auyay dikri hoyacha.*" The Judge then says: "It is to be remarked "that in this case the suit was to recover "certain lands which the defendant had "wrongly caused to be demarcated as his "own, and I can scarcely conceive under "such circumstances that the plaintiffs could "have referred to other lands which people "had similarly caused to be demarcated as "in their possession without clearly asserting "the fact that they (the plaintiffs) were in "possession of such lands." But it does not appear how the plaintiffs were entitled to make use of the proceedings in this case as evidence against the defendants. Then there is the evidence of one of the witnesses for the defendants, *viz.*, that of Joogul Kishore Banerjee. That evidence is disposed of by the Judge in these words: "I think "it right to notice more particularly the "evidence of Joogul Kishore Banerjee as "the Subordinate Judge comments on it "as being very favourable to the defendants' "case. This witness says that he has heard "that since the recent alluviation, this chur "has been taken possession of by the defend-"ants, having formerly been in the posses-"sion of the plaintiffs; that their village of "Karporah had Dubsha to the north formerly, "that Murrichputty is to the east of Kar-"porah some distance, and that this chur, "when thrown up last, had Bohur village on "the north." The Judge then goes on: "It is much to be wished that this witness had "been cross-examined with some strictness "as to what he really did mean." We presume that cross-examination is not what the Judge had in mind at the time, for he says: "I would remark that the question before us "is not quite whether the land at present "claimed occupies exactly the same site as that "originally claimed in 1842 when the lands "first appeared, for they have diluviated and "alluviated several times since; but has this "land been thrown up on the site of the lands, "which the plaintiffs caused to be demarcated "at the thak as belonging to his villages? "Was the plaintiff then in possession of these "lands, and were those thak proceedings "correct or fraudulent? Now, if the witness "means that the land demarcated as Karporah "at the thak was opposite Dubsha, he is "clearly making a mistake, for the thak "map, which is not likely to be scientifically "incorrect, clearly shows Bhatkul Murrich-"putty north of Karporah; and if, on the "other hand, he means that the real site of "the village of Karporah is to the south of "Dubsha, thereby implying that the thak "map was an incorrect delineation of the "real position of the estates affected by it, "his evidence is rather beside the mark, "since the point to be decided is not "whether the thak assigned each pro-"prietor's land exactly where it ought to "have been, but whether it was a correct "representation of the way the existing "villages were then held." But, if the thak map is merely the correct representation of the way in which the villages were then held, it was clearly no evidence of title, but only of possession. The way in which the evidence of this witness has been dealt with offers one of the illustrations showing that the Judge did not really apprehend the true issue.

There is one more point which we were

unwilling to advert to, but which we now think it our duty to do. Part of the evidence in this case was a previous decision of the Subordinate Judge in a case between the parties, and which was affirmed by a Division Bench of the High Court in 1868. In respect of this case the Judge makes these observations: "Now this was a claim to "recover possession of certain lands, and "which came before the Subordinate Judge "in the way of appeal. Undoubtedly the "Subordinate Judge found the thak map "wrong, but it is not correct to say that the "High Court upheld this. The High Court "upheld the decision of the Subordinate "Judge generally, because apparently they "were not quite clear what the purport of "that decision was, and therefore did not "like to say it was wrong." Any thing more unbecoming and more improper it is difficult to conceive. The Judge, however, has not only remarked in these terms upon that decision, but he has restricted the effect of the decision so affirmed in a way which appears to be unfair towards the defendants. He has looked at the ground on which that decision proceeded, and choosing to consider that the decision was erroneous, although its effect could not be got rid of, he has given it only the effect of maintaining the defendants in possession of the land to which the decision related, and has entirely omitted to consider the effect on the plaintiffs' case of the circumstance, that by that decision the defendants were confirmed finally in possession of a portion of the land now in dispute, and which lies in the very centre of the land which the plaintiffs claim. Without wishing to carry the decision in the previous case between the two parties a single inch beyond the length it ought to go, it appears to us that the defendants are entitled to consideration of that point. It has been suggested to us that the decision of the Judge, however wrongly he may have placed the burthen of proof, has proceeded on evidence, and that, in respect of plots 2, 3, and 4, it is quite consistent with the evidence, and might be affirmed so far. But, adverting to the errors we have indicated in the decision of the Judge, it appears to us impossible to estimate the effect which the evidence might have had on the Judge's mind if he had looked at it in a proper point of view, and consequently we have no choice, but to remand the case to him for a fresh decision upon the evidence.

The costs of this appeal will follow the result.

The 12th August 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Execution—Appeal—Security-bond.

Case No. 664 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Backergunge, dated the 29th December 1871, affirming a decision of the Moonsiff of Dukhin Shabazpore, dated the 24th August 1871.

Shuryuttoollah Mirdha (one of the Defendants), *Appellant,*

versus

Teeta Gazee Howladar (Plaintiff), *Respondent.*

Baboo Doorga Mohun Doss for Appellant.

No one for Respondent.

Where a decree-holder, pending appeal, gives a security-bond whereby he undertakes that, if the decision of the first Court is reversed or modified by the Appellate Court, he will make good any property taken by him in execution, the effect of such an undertaking is to bind him, in the event of the Appellate Court deciding that the claim of the creditor was in whole or in part untrue, to make good to the other party anything taken in respect of the amount so found not due. The bond would not bind the decree-holder to conform to a mere direction as to the manner in which the decree was to be executed, when that direction came too late, but would need to be construed equitably; and the other party, if still a debtor to the decree-holder, would not be entitled to recover anything unless it were shown that he had sustained damage.

Jackson, J.—In this case it appears to us that the decisions of the lower Courts cannot be supported. The case was simply this: The defendant in this suit advanced a sum of money to the present plaintiff on the security of a mortgage of immoveable property, and upon that mortgage-bond he afterwards sued, but it came out on the trial

at the debtor had already sold to some one
e the property hypothecated, and accord-
gly a general money-decree against the
orrower was given by the Court of first
stance. The judgment-debtor appealed,
d on appeal the decree was modified by
claring that the hypothecated property
ould first be resorted to in satisfaction of
e debt. In the meantime the execution-
editor had given security, and proceeded to
ecute his decree, and in execution caused
e sale of other properties belonging to his
btor. The debtor has brought the present
t in order to recover the amount realized
the sale of the properties contrary, as he
ges, to the direction of the Lower Appel-
e Court, and in contravention to the secu-
-bond executed by the creditor, and has
t a decree from both the lower Courts.
ow inequitable such a decree would be
ems to us to appear from certain passages
the judgment of the Moonsiff. He says:
"It appears, on a reference to a decision of
"the first Court filed on the part of the
"defendants, that, owing to the admission of
"this plaintiff that he had alienated the pro-
"perty hypothecated in the bond in viola-
"tion of the contract given by him respect-
"ing the same, a decree was made for the
"debt secured by the bond, but that no order
"was passed for its satisfaction from the said
"hypothecated property. On appeal by the
"plaintiff, the order of the lower Court was
"modified, and a decree was made for the
"realization of the money first from the
"mortgaged property." So that this person (the plaintiff) having borrowed money from the present defendant on the security of property which he hypothecated, first violated his own contract by selling the property to some one else, then obtained, under what circumstances we are at a loss to understand, a decision from the Appellate Court that the creditor was to proceed in the first instance against a property which, it was clear, had passed out of the debtor's hand, and then availed himself of that subsequently-obtained decree of the Appellate Court to visit upon the defendant the consequence of an act done with the sanction of the Court which passed the original decree. The Moonsiff considered that the modification ordered by the Appellate Court in that previous suit must be dealt with as a variation of that original decree, and, in that curious way of reasoning, he held the present defendant to have done something which was not warranted by the decree. It appears to us that this contention is untenable. The law declares that execution of a decree shall not necessarily be suspended by the pendency of an appeal, and, by so providing, it allows a party to execute his decree by giving such security as the Court thinks fit to demand for the due performance of the decree or order of the Appellate Court, and this brings us to the construction of the security-bond which the defendant had given. He, no doubt, thereby undertook that, if the decision of the first Court were reversed or modified by the Appellate Court, he should make good any property taken by him in execution; but the effect of that we understand to be that, if the Appellate Court decided that the claim of the creditor was in whole or in part untrue, and in that respect reversed or modified the decision of the Court below, then the creditor would be bound to make good to the other party anything which would be taken in respect of the amount so found not to be due. But he did not, as we apprehend, undertake to conform to a mere direction as to the manner in which the decree was to be executed, when that direction came too late to be acted upon. But, in addition to this, it seems to us that the security-bond would have to be construed equitably, and that, under any circumstance, considering the relation between the parties as creditor and debtor, the plaintiff would not be entitled to recover anything, unless it were shown that he has sustained damage. Whether it was right or not to sell the properties taken in execution, it is clear that the proceeds of it all went to satisfy the debts of this very plaintiff. It does not appear that any special damage accrued to the plaintiff, nor does it appear that the whole debts of the plaintiff due to the defendant has yet been satisfied. It seems to us, therefore, that the plaintiff had no real ground of action in this case, and that he merely sought to enforce the literal terms of a security-bond which, in reality, had to be considered together with the whole facts of the case. We think the judgment of the lower Courts must be reversed, and the plaintiff's suit dismissed with costs.

It may be added that the defendant in this case is in fact absolved from carrying out the literal decree of the Appellate Court in the previous suit, because *ex concessis* the property hypothecated could not have been sold at the first instance without a suit being first brought against the party in whose hand the property had passed, and the decree of the Appellate Court did not and could not contain any such direction.

The 18th August 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Disputed Will—Procedure—Testator's Signature.

Cases Nos. 177 and 187 of 1873.

Miscellaneous Appeals from an order passed by the Officiating Judge of Dacca, dated the 17th March 1873.

Kalee Tara Dossia and another, Defendants (Opposite Party), *Appellants,*

versus

Nobin Chunder Kur, Plaintiff (Petitioner), *Respondent.*

Mr. C. Jackson and *Baboo Kashee Kant Sen* for Appellants.

Baboos Mohinee Mohun Roy and *Bharut Chunder Dutt* for Respondent.

Where a will is disputed, the proceedings should take, as nearly as possible, the form of a regular suit according to the provisions of the Code of Civil Procedure, the petitioner for probate being the plaintiff, and the opposing party the defendant.

To entitle the executor to a probate, the signature of the testator must be that of a conscious person, and not the result of mere mechanical movement of the hand.

Jackson, J.—In this case the Judge had to determine whether the will propounded by one of the parties had or had not been duly executed. The opposite party contended in the first place that the will had not been executed, and in the next place that, if it had, the alleged testator was at the time *non compos mentis*, being in a state of unconsciousness and incapable of understanding what it was about. On this point, the Judge says: "The second point is not, I "think, a question of which cognizance can "be taken in the present case. Such a point "must ordinarily involve a long inquiry, and "it seems to me wholly unreasonable that "this elaborate inquiry should be made "simply as a sort of foot-note to making it "all over again in a regular suit." We think it was in a case from Dacca that we lately had occasion to call the attention of the Judge to the provisions of the Indian Succession Act in which what is called the procedure in contentious cases had been pointed out, *viz.*, that the proceedings shall take, as nearly as possible, the form of a regular suit according to the provisions of the Code of Civil Procedure, in which the petitioner for probate shall be the plaintiff, and the person who may have appeared to op the grant shall be the defendant; yet Judge conceives that, because the inquiry arises upon this issue is likely to be elabo he is justified in refusing to make it, referring the parties to a regular suit. only it appears the Judge has omitte come to a finding upon the evidence recor in this matter, but it appears that the w of the evidence on the other side has been taken. Under these circumstances, have no choice but to reverse the order the Judge, and order a new and proper t

This order will apply to No. 187.

The costs will abide the result.

The Judge appears to be under the pression that mere mechanical signa would be sufficient to entitle the executo a probate. This, however, is not so. signature must be that of a conscious per and not the result of mere movement of hand.

The 18th August 1873.

Present:

The Hon'ble Louis S. Jackson and Dwark nath Mitter, *Judges.*

Suit to set aside Adoption—Onus Probandi.

Case No. 147 of 1872.

Regular Appeal from a decision passed by Officiating Subordinate Judge of Dac dated the 13th April 1872.

Gooroo Prosunno Singh (Defendant), *Appellant,*

versus

Nil Madhub Singh and others (Plaintiffs), *Respondents.*

Baboos Sreenath Doss, Kalee Mohun Das and *Doorga Mohun Dass* for Appellant.

Baboos Romesh Chunder Mitter and *Nulli Chunder Sen* for Respondents.

In a suit to have it declared that an adoption, which has long taken place, and has been acted upon, and in virtue of which defendants are in possession, is a fraudulent and false adoption, the onus lies on the plaintiff to make out, to some extent at any rate, the fraud and falsehood alleged.

Jackson, J.—This was a suit to set aside the adoption of one Gooroo Prosunno who was said to have been adopted by Joy Doorga, the widow of Pran Kisto, and also to establish and declare that this Gooroo Prosunno had no right to the property le

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Unnoda Pershad, the grandson of Pran Kisto. Some portion of the facts alleged by the plaintiff are not admitted, but the disputed facts appear to be these: That Pran Kisto died, leaving a widow and also an adopted son, Doorga Pershad; that Doorga Pershad succeeded and remained in possession of the property till he died, either in 1261 or in 1262; that, at the time of Doorga Pershad's death, his wife was living; that his wife is not now in possession of the estate; and that Joy Doorga, Pran Kisto's widow, who seems to have been in possession at the time of her death, and who was a woman advanced in age when she died, did, shortly before that event, take in adoption Gooroo Prosunno under an alleged power from Pran Kisto. The plaintiff, who has since died, claims as heir to the property, and it is not, we believe, disputed that, as regards kinship, if Joy Doorga and Shama Soonduree were out of the way, and no adopted son was in existence, he would have been heir to the property. The plaintiff also alleged, what is denied, that Shama Soonduree was pregnant at the time of her husband's death, and afterwards gave birth to a male child named Unnoda Pershad, who lived less than a year. The defendants alleged that Shama Soonduree was unchaste, and that, shortly after the death of her husband, she left his house, and has been since and is now living an immoral life, and they denied that any such child as Unnoda Pershad was ever born. They alleged that Pran Kisto, some years before his death, that is to say, in 1249, gave Joy Doorga power to adopt three sons in succession, and adopted, while still alive, a son named Doorga Pershad, but that subsequently, in 1252, he made over his property under a will to Joy Doorga, and died in 1256. There were other issues to which it is not necessary now to advert.

The Subordinate Judge who tried this suit, after disposing of certain objections to the plaintiff's right to succeed, entered upon the question of the deed of permission granted to Joy Doorga. On that point, he discussed the evidence given by the defendants, and coming to the conclusion that that evidence was unworthy of credit, he declared the adoption to be invalid, and gave judgment in favour of the plaintiff.

It appears to us that the defendants, appellants, contend justly on the authority of a decision of this Court, delivered by the late Chief Justice, Sir Barnes Peacock, printed in 9 Weekly Reporter, page 463, that the burden of proving an affirmative in this case lay upon the plaintiff, and we therefore called upon the pleader for the plaintiff to show us that he had made out such a case. The evidence for the plaintiff has been most of it read over to us by the appellant's vakeel, and admittedly there is nothing in that evidence which amounts to anything more than hearsay statement, except, perhaps, that of Ram Churn Dutt; and Baboo Romesh Chunder Mitter, vakeel for the respondent, very fairly admitted, as indeed he could not help admitting, that, if it lay upon his client to make out a case affirmatively, there really was no matter upon which the judgment of the Court below could be supported. But he contended that, under the circumstances of this case, the burden of proof lay upon the defendants, and he undertook to show that the adoption of Gooroo Prosunno, even if made under a valid instrument, could not amount to a valid adoption; and, in support of that contention, he referred us to the judgment of the Judicial Committee given by Lord Kingsdown in the case of Mussamut Bhoobun Moyee Debia *vs.* Ram Kishore Acharjee Chowdhry, reported at page 279, Volume IX., Moore's Indian Appeal Cases.*

On the first point we have no doubt whatever. This was not a suit for relief in the shape of obtaining possession of property. It was a suit for declaration of title. The Court was asked to declare that an adoption which had long taken place, and had been acted upon, and in virtue of which the defendants were in possession of the property, was a fraudulent and false adoption. In that state of the allegation, it was, no doubt, the business of the plaintiff to make out to some extent at any rate the fraud and falsehood which he alleged. An examination of the evidence to which we have already referred shows very clearly that the plaintiff in this respect has altogether failed. Then, as to the principle laid down in the case of Bhoobun Moyee Debia above referred to, it seems to us that the observations of the Judicial Committee in that case do not apply to the present. The situation of the parties is altogether different; in fact, it is the very reverse. In that case the plaintiff relied upon a power to adopt which he set up as entitling him to recover possession of the estate from the party on whom it had devolved, and their Lordships held that, looking to the intention

* 3 W. R. (P. C.) 15.

of the ancestor in giving that power to adopt, and looking at the circumstance that that ancestor had been succeeded by a son, and that presumably the intention of that ancestor had been affected by it, the first adoption could not be followed by a second adoption under the same instrument. Their Lordships use these words at page 309: "The instrument before us is merely what "it purports to be—a deed of permission to "adopt; it is not of a testamentary charac- "ter; it was registered as a deed in the life- "time of the maker; it contains no words of "devise, nor was it the intention of the "maker that it should contain any disposition "of his estate, except so far as such "disposition might result from the adoption "of a son under it. He mentions the "objects which induced him to make the "deed,—religious motives, the perpetuation "of his family, and the succession of his "property; but it was by the adoption, and "only by the adoption, that those objects "were to be secured, and only to the extent "in which the adoption could secure them." And further on: "The question is whether "the estate of his son being unlimited, and "that son having married and left a widow "his heir, and that heir having acquired a "vested estate in her husband's property as "widow, a new heir can be substituted by adop- "tion who is to defeat that estate, and take as an "adopted son what a legitimate son of Gour "Kishore would not have taken. This seems "contrary to all reason and to all the prin- "ciples of Hindoo Law as far as we can "collect them. If Bhowanee Kishore had "died unmarried, his mother, Chundrabulee "Debia, would have been his heir, and the "question of adoption would have stood on "quite different grounds. By exercising the "power of adoption, she would have divested "no estate but her own, and this would have "brought the case within the ordinary rule, "but no case has been produced, no decision "has been cited from the text-books, and no "principle has been stated to show that, by "the mere gift of a power of adoption to a "widow, the estate of the heir of a deceased "son vested in possession can be defeated "and divested." These observations refer to a state of things entirely opposed to the facts here. The only parallel to the case of Bhoobun Moyee, which could have arisen to the present case, would have been if Shama Soonduree, Doorga Pershad's widow, had been now in possession of the property, and if the suit had been brought by Gooroo Prosunno to divest her of the property, and put himself in possession thereof. Shama Soondu however, is out of possession, and it is qu tionable if she ever was in possession. that state of things, it appears to us t the observations of the Judicial Commi are not applicable to the circumstances of present case; that Joy Doorga, by exercis the power of adoption would, to use words of Lord Kingsdown, have divested estate but her own, and the adoption the fore would not be void. For the abo reasons, we think the decree of the lo Court must be set aside, and the plainti suit dismissed. The defendants will entitled to their costs of the lower Court.

As to the costs of this appeal we make order.

The 21st August 1873.

Present:

The Hon'ble Louis S. Jackson and Dwark nath Mitter, *Judges.*

Suit by mortgagee—Money-decree—Execut —Act VIII. of 1859, s. 271.

Case No. 807 of 1873.

Special Appeal from a decision passed the Officiating Judge of Dacca, dated 14th January 1873, affirming a decisi of the Officiating Subordinate Judge that District, dated the 29th May 1872.

Radha Kant Roy (Plaintiff), *Appellant,*

versus

Mirza Sudafut Mahomed Khan and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *La Mohun Doss* for Appellant.

Baboos Huree Mohun Chuckerbutty and *Kashee Kant Sen* for Respondents.

Where a mortgagee suing upon his bond obtains money-decree without any declaration of lien, he is in the same position as if he had not taken any mortgage at all; and in taking out execution his claim to a rateable distribution of surplus sale-proceeds of attached property is founded upon s. 271 of the Civil Procedure Code.

Jackson, J.—THE plaintiff in this case lent a certain sum of money to one Asmut-oonnissa, and took from her a bond by which she pledged to him 3 annas share of a certain estate. On the 22nd May 1865, the plaintiff obtained a money-decree upon this bond, which decree was afterwards affirmed on appeal. The lady in question had other creditors, amongst whom were some of the defendants in this suit, and one Hedayut Ali; and Hedayut Ali, it seems, had, in execution of

decree, attached and sold another share of e same estate, *viz.*, a 2½-annas share out of ich his claim was satisfied, and the present aintiff and the defendants applied to receive eably the surplus sale-proceeds in con-deration of their respective decrees, and an der of that kind was made by the Court ecuting the decree. The defendants, how-er, being dissatisfied with that order, ppealed to the Zillah Court, and the Zillah ourt, undoubtedly without jurisdiction, set ide the order of the lower Court, and dered that the defendants alone were ntitled to share in the surplus proceeds. The aintiff brought the present suit to recover om the defendants the sum which he con-ders himself to have been entitled to out of ose surplus proceeds. The defendants ppear to have urged in their defence that the aintiff having a mortgage over the 3-annas hare of this property was not entitled to a hare in the surplus proceeds of the 2½-annas hare, and also that he was disentitled by eason of his not having attached that parti-ular share. Both the Courts below have oncurred in dismissing the plaintiff's suit. The Judge's decision, which is that of the Court of Appeal, proceeds upon the ground hat "the plaintiff is not an unsecured reditor;" that "he had a lien against a pecific property;" and that in so far as he ad secured himself by a lien upon the 3 nnas, he was entitled to the benefit of his oresight, but that he was not entitled to be rotected in that part of the transaction in hich he had not exhibited foresight. The laintiff in this case appears to stand in pre-isely the same position as if he had not aken any mortgage at all. He did not sue pon his mortgage, nor did he obtain any declaration of lien in the decree which he btained. The ground of the plaintiff's right nd of the present suit is section 271 of the Code of Civil Procedure. That section, after providing that the attaching creditor should be first paid in full, goes on to pro-vide that, if there be any surplus, "such "surplus shall be distributed rateably "amongst any other persons who, prior to the "order for such distribution, may have taken "out execution of decrees against the same "defendant, and not obtained satisfaction "thereof." That is a declaration without any reservation as to the equitable rights of secured or unsecured creditors. The clause following, which provides that, "when any "property is sold subject to a mortgage, the "mortgagee shall not be entitled to share in any surplus arising from such sale," shows that the Legislature had in view a particular case in which it would not be right to allow participation by the execution-creditors, and the making of that one particular exception goes clearly to show that the Legislature did not intend that any other exception was to be made. It is contended that the plaintiff is not a person "who, prior to the order for "distribution, had taken out execution of his "decree against the same defendant and not "obtained satisfaction thereof;" and it is also said that these provisions of the Code are not applicable to cases of persons who have securities for their decrees, but only to creditors of mere money-decrees. The vakeel who advanced this contention was unable to refer us to any other section of the Code which would provide for this plaintiff's decree, if he did not come under the provi-sions which are now under consideration. In point of fact, however, his was a mere money-decree. It appears to us, therefore, that the plaintiff having been entitled under section 271 to a rateable distribution, and the defend-ants having resisted him in obtaining such distribution, and having got possession of the money which ought to have come to plaintiff by an order of the Appellate Court made without jurisdiction, they are clearly liable to refund that money to the plaintiff at his suit. It appears, however, that in the mean time the plaintiff has proceeded to sell the property hypothecated to him by Asmutoon-nissa, and has recovered not all, but a large portion of the sum remaining due to him. Therefore, when the case goes back to the Lower Appellate Court, that Court will have to determine what sum, under the circum-stances, is due to the plaintiff; because, if, after ordering payment to the plaintiff of the amount due under section 271, and taking into account what he has received otherwise than in execution, the two amounts should exceed his entire claim against Asmutoon-nissa, the Court of course will not direct the balance over and above such claim to be paid to him, but the plaintiff's relief should be restricted to the amount due to him in full. It is almost needless to say that, when any property is sold subject to a mortgage, the Legislature, in the words we have quoted, does not mean the mortgagee of another portion of the same estate, but that it means the mortgagee of the very property sold.

Baboo Romesh Chunder Mitter admits that the defendant No. 4, for whom Baboo Kashee Kant Sen appears, has been unneces-sarily made a respondent. He will therefore be entitled to his costs.

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The 26th August 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Rent-suits—Issues—Act VIII. (B.C.) of 1869.

Cases Nos. 1384, 1386, and 1387 of 1872.

Special Appeals from a decision passed by the Subordinate Judge of Furreedpore, dated the 20th July 1872, reversing a decision of the Moonsiff of Goalundo, dated the 22nd April 1872.

Radha Malakar and others (Defendants), *Appellants,*

versus

Srishtee Narain Shaha and others (Plaintiffs), *Respondents.*

Baboos Chunder Madhub Ghose and *Doorga Mohun Doss* for Appellants.

Baboos Mohinee Mohun Roy and *Issur Chunder Chuckerbutty* for Respondents.

A suit for rent, as authorized by Act VIII. (B. C.) of 1869, to be tried in the Civil Courts, must be a *bonâ-fide* suit for rent, and not a trial of a wholly different issue between parties advancing conflicting claims of ownership to the estate.

Jackson, J.—It appears to us manifest in this case that the plaint was improperly framed, and that the plaintiffs were not entitled to maintain this suit. The plaintiffs alleged themselves to have purchased in 1278 the fractional portion of an interest, itself fractional, belonging to Ram Chand, and immediately after they commenced a suit for the sum of three pies as rent for the kist immediately succeeding their purchase. The result of this suit was, and we cannot doubt it was, a result fully anticipated by the plaintiffs that another party intervened impeaching the plaintiffs' purchase, and setting up an entirely different title to the estate for which the rent was claimed. The Moonsiff, as we think, properly refused to go into this question, but the Subordinate Judge on appeal reversed the decision of the Moonsiff.

We wish to take this opportunity to state our own opinion that the effect of the transfer of jurisdiction as to rent-suits from the Revenue Courts to the ordinary Civil Courts was not to enable plaintiffs to expand the provisions of the law relating to them and the intervenors, which merely referred to the previous enjoyment of the rent, into a trial of an entirely new and complicated issue between plaintiff and some other person cla ing title to the estate; but that a suit for r as authorized by Act VIII. of 1869 (B. C.) be tried in the Civil Courts, must be a *bo fide* suit for rent, and is not to be a trial wholly different issue between parties adva ing conflicting claims of ownership to estate. We state this opinion, because question would certainly arise in this case the plaint were not defective, and it may useful to intimate an opinion; but the gro of our decision in the present case mus that the suit as brought is one which ou not to be maintained. For this reason decision of the Lower Appellate Court m be reversed, and the plaintiff's suit dismis with costs.

We think, in such cases, to admit fre intervenors, as has been done in this case, the purpose of trying questions of title between them and the plaintiffs would be most mischievous exercise of the discreti vested in the Courts by section 73 of t Civil Procedure Code.

This judgment will apply to Nos. 13 and 1387.

The 19th September 1873.

Present :

The Hon'ble Louis S. Jackson and Dwarka nath Mitter, *Judges.*

Malikana—Set-off—Limitation.

Case No. 999 of 1871.

Special Appeal from a decision passed by th Subordinate Judge of Bhaugulpore, date the 5th June 1871, reversing a decision o the Moonsiff of Soorujgurrah, dated th 31st December 1869.

Syud Shah Aleh Ahmud (Defendant), *Appellant,*

versus

Nehal Singh (Plaintiff), *Respondent.*

Mr. C. Piffard and *Moulvie Syud Murhumut Hossein* for Appellant.

Mr. J. T. Woodroffe and *Baboo Boodh Sen Singh* for Respondent.

Where an arrangement has been effected by which malikana is to be paid, not in cash, but as a set-off against the rent payable to be deducted therefrom, and it is not shown that the right to such malikana has been alienated, the fact of its not having been paid in cash for twelve years is not a bar to the claim of the maliks for the malikana.

Jackson, J.—It seems to us that, although argument in these cases has been a good prolonged, the decision of the matter is ly very simple. The whole question ore us on the re-hearing of the special eal is whether the plaintiffs' suits are red by reason of their not having eived the malikana which they now claim hin twelve years. On this point it ms sufficient to say that the documents ich are read to us by Mr. Woodroffe, and ich the Court below was bound by the vious order of this Court to have referred in these cases, distinctly show that in 5 and 1266 arrangements were come to ween these parties, that is to say, between ties whom they represent in title, whereby malikana was not to be paid in cash, but to be deducted from the amount of rent yable by the plaintiffs to the defendant. at being so, and the defendant not having, ce that time until the bringing of the ent suits in the Revenue Court, collected e gross rent on account of the lands occued by the plaintiffs, we are entitled to hold at the arrangements were not repudiated. othing has been done to show that the rangement did not subsist down to the me when the defendant brought the suits r the gross rent of the lands. On the ntrary, as soon as he brought those suits, e plaintiffs immediately objected that they ere entitled to a deduction of the malikana. ey raised several pleas; but this was disctly raised that the malikana was to be t off against the rent, and it appears very early that the Revenue Court only stained from any decision on that point, ecause it considered itself precluded by nited jurisdiction from doing so. The arned Counsel for the special appellant, r. Piffard, has suggested that the arrangements contemplated in those purwannas ave been departed from, either by alienations f the plaintiffs' rights, or by surrender of he lands, or by difference in the extent of he lands which they held at the time; but hese are merely suggestions. It is not hown that the defendant has acquired the laintiffs' right to receive the malikana which as acknowledged in these documents. It not shown, and there is no reason whatever o suppose, that the lands now occupied by he plaintiffs, and in respect of which they ave been sued for rents, are either different nds, or more or less in quantity than the nds which they then occupied. It appears us that after the defendant's ancestors had ldressed the plaintiffs' ancestors the purwanna dated the 22nd Cheyt 1265, and under the circumstances of the case, it would lie upon the defendant to set up and prove the alienation of the plaintiffs' right to the malikana which was there acknowledged, and that it would not be open to the defendant, after having come to an arrangement with the plaintiffs by which their malikana was not to be paid in money, to turn round and say, "you did not receive any malikana in cash, and therefore your suit is barred." It seems to us therefore that the substance of the decision of the Lower Appellate Court is right; that the plaintiffs' suits are not barred; and that they are entitled to a decree.

These cases were dealt with originally in the Court of first instance as consolidated. It has been thrown out more than once at the hearing of this appeal to-day that the cases present some points of difference between them. We asked the learned Counsel for the special appellant in what respects they differed from one another, and from the one under consideration, and he has been unable to give any satisfactory answer. In this state of things, we consider we are justified in making one order in all these appeals, *viz.*, that all these special appeals will be dismissed with costs.

The 19th November 1872.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Mitakshara Law—Succession—Family Custom—Law of Primogeniture.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Mussamut Sheo Soondooree

versus

Pirthee Singh and others.

The question in this cause was the right of succession to Talook Sunkra, which had been held by S, the common ancestor of plaintiff and defendant, and settled with him after resumption by Government.

Plaintiff's case was that S left two sons, M and plaintiff, who was a minor; that M took possession, and, in law, held for himself and infant brother; that, on M's death, his son D took his place as managing member of the joint family; and that, on his death, leaving only a daughter (the defendant), plaintiff became entitled under the Mitakshara to the whole estate.

The defendant's case was that plaintiff was illegitimate, and that the estate descended from D to herself, an alternative defence being that, according to family-custom,

* From the judgment of Kemp and Glover, JJ., in Regular Appeal No. 48 of 1866, decided 27th July 1867, 8 W. R. 261.

the right of inheritance had been invested in the line of the eldest son.

The only issues settled were :—

1. Whether respondent (plaintiff) was the legitimate son of S.

2. Whether the law of primogeniture obtained in S's family.

Accepting (as the Privy Council did) the High Court's finding that plaintiff had established his legitimacy, the estate, which was admitted to be ancestral, and presumed to be joint, would, in the absence of a special family-custom, descend to his two sons, leaving plaintiff entitled to one moiety at least. Whether he would be entitled to more would depend on the general law of succession to be applied. The Privy Council remanded the case for trial of the following issues :—

1. Whether S left any other legitimate sons than M and plaintiff; and if any are dead, whether they have left any male descendants.

2. Whether the estate of S, which was formerly within Zillah Beerbhoom, having been transferred to Zillah Bhaugulpore, the succession thereby became regulated by the law of the Mitakshara ; or whether, by reason of any local or family-custom, it continued to be governed by the Dayabhaga.

THIS appeal was heard some months ago. Whilst it stood for judgment, their Lordships were asked to suspend their decision in the hope that a proposed compromise would be effected. They have since been informed that the negotiations for a compromise have failed, and that the parties desire to have their Lordships' judgment, which I now proceed to deliver :—

The question in the cause was the right of succession to an estate called Talook Sunkra, forming part of Tuppa Belputta in Zillah Bhaugulpore. The estate was unquestionably held by Soomaer Singh, the common ancestor of the appellant and respondent, and, having been resumed by Government with the rest of Tuppa Belputta, was temporarily settled with him in 1840. Soomaer Singh died in March 1851.

The case of the respondent (the plaintiff in the cause), as stated in the plaint, is that Soomaer Singh left two sons, *viz.*, Manick Singh and the respondent, the latter being a minor at the date of his father's death, and continuing to be so until March 1865; that Manick Singh took possession of the property, but, at least in law, held it on behalf of himself and his infant brother as members of a joint and undivided Hindoo family; that on Manick's death, his son Durbejoy took his place as managing member of the joint family; that, on the death of Durbejoy, leaving only a daughter, the respondent became entitled, under the law of the Mitakshara, which is the law of Zillah Bhaugulpore, to the whole estate, the daughter (the appellant) being entitled only to maintenance; but that, nevertheless, he had been dispossessed by the Court of Wards, acting on her behalf, which had since procured a permanent settlement of the property to be made in her favour.

The case made by the Court of Wards on behalf of the appellant is that Soomaer Singh left only one legitimate son, Manick (the respondent being illegitimate), and, accordingly, that the estate descended from Soomaer to Manick, from Manick to Durbejoy, and from the latter to the appellant. The answer set up also an alternative defence, *viz.*, that, according to the custom and usage of the family of Soomaer Singh and the zemindars in the neighbourhood, the right of inheritance has generally been vested in the line of the family of the eldest son in succession. The only issues settled in the cause (p. 72) were :—

1. Whether the respondent is the legitimate or illegitimate son of Soomaer Singh.

2. Whether the law of primogeniture obtains in the family of Soomaer Singh or not.

A further question, which does not appear on the pleadings, was raised in the course of the suit, *viz.*, whether the district in which the estate is situate (Tuppa Belputta) having been transferred as late as 1795 from Zillah Beerbhoom, of which it was theretofore part, to Zillah Bhaugulpore, the general law of succession to be applied to the case was that of the Dayabhaga or that of the Mitakshara.

The respondent being out of possession, the burthen of maintaining the first issue, of course, lay upon him. And if he had not done so, his suit must stand dismissed. But, if it be assumed that, as the High Court has found, he has succeeded in establishing his legitimacy, it becomes material to consider what in such a case would be the remaining questions between the parties.

The property is admitted to be ancestral; and the family, if not admitted, must be presumed, to be joint. Hence, in the absence of a special law of descent, founded on family or other custom, the estate at Soomaer's death would descend to his two sons as Hindoo co-parceners; and on Manick's death, Durbejoy would succeed only to his father's moiety. The respondent, therefore, would unquestionably be entitled to at least a moiety of the estate.

Whether he would be entitled to more depends on the question what is the general law of succession to be applied? Under the law of the Mitakshara, he would succeed to Durbejoy's share, subject to his daughter's right to maintenance ; under the law of the Dayabhaga, she would succeed to

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r father's share in preference to her
cle.

To establish, therefore, the appellant's
e to the whole estate, she must prove a
ecial and customary rule of succession; to
ablish her title to even a moiety, she must
ow that the succession is to be regulated
the law of the Dayabhaga.

Again, the second issue as settled does not
mprehend the whole of what is essential
the appellant's title to the whole estate.
r let it be granted that the rule of primo-
niture did obtain in Soomaer Singh's family,
at circumstance would, no doubt, support
e title, first of Manick, and afterwards of
urbejoy, to the estate as impartible. But,
n the death of Durbejoy, the next male
ember of the joint family would, under
e law of the Mitakshara, be entitled to
ceed to the ancestral estate, though
npartible, in preference to the daughter of
e last holder. This was admitted in the
hivagunga case,* although on the ground
hat the impartible estate in question was
e separate acquisition of the last holder,
was there ruled that it ought to descend,
ccording to the rule of succession to
eparate estate, to his widow. Hence, to
ake out the appellant's title to the whole
state, it must be shown, both that by custom
was impartible, and descended according to
e law of primogeniture; and also that,
ither by special family-custom, or by the
peration of the law of the Dayabhaga, as
he law which should govern the case, she,
n the death of her father, was entitled to
ucceed to it, in preference to her great-
ncle.

It is next to be considered what are the
roper findings on the settled issues.

The Principal Sudder Ameen altogether
mitted to decide the first. The High Court,
n a careful review of the evidence, came to
he conclusion that the plaintiff (the present
espondent) had established his legitimacy;
nd, at the close of the argument at the bar,
heir Lordships were clearly of opinon that
o case had been made for disturbing that
inding.

Upon the question of the alleged family-
custom, the decisions of the two lower
Courts were in conflict; the Principal
Sudder Ameen holding that the evidence
showed that the estate was impartible, and
hat the appellant was entitled to succeed to
t. It is not, however, very clear whether
he rested the appellant's right of succession
on family-custom, or on the law of the Dayabhaga, treating that as the law which was to govern the case. The High Court held that there was no proof of any custom which varied the ordinary law of inheritance; that the law to be applied was that of the Mitakshara; and, consequently, that the respondent was entitled to recover the whole estate.

The point to be first considered on this part of the case is, whether the first of these propositions of the High Court is correct.

The fresh evidence adduced by the appellant in support of the alleged custom is very slight. Of the five witnesses called by her, two only speak to the custom. One of these does not put it higher than a custom by which the eldest son takes the whole estate; and, in answer to the plaintiff's pleader, admits (thereby recognizing the applicability of the Mitakshara) that, on the death of the eldest son, after he has taken possession of the property, leaving only a daughter, the brother would take before the daughter. (See p. 72, line 39.)

The documentary evidence does not carry the case much further. Mr. Sutherland's Report does not show more than that, in the year 1819, there was great confusion and uncertainty as to the nature of the sub-tenures in Tuppa Belputta; that Soomaer Singh was then claiming many villages to which he was not entitled; that the documents of title produced by him were untrustworthy; and that, if the villages specified in List No. 1, p. 35 (of which only two are identified as villages now in dispute), were originally held on a ghatwallee tenure, the ghatwals in that district (see p. 29, line 50) had virtually ceased to be such, and had become mere under-farmers. It does not appear what was done on this report; but it is certain that many years after its date, *i. e.*, in 1840, the talook in dispute was resumed by Government, and settled as ordinary malgoozary land with Soomaer Singh.

The other documentary evidence of the appellant proves little or nothing. But it is remarkable that the proceedings for the mutation of names on the deaths of Soomaer and Manick, which form part of it, contain the usual inquiry whether there were other heirs of the deceased; and that in neither instance was the claim expressly asserted as one founded on the right of primogeniture.

On the other hand, it is singular that the strongest evidence in favour of the position that the estate had been treated as in the

* 2 W. R. (P. C.) 31.

nature of a raj is to be found in the oral testimony given on the part of the respondent. (See in particular witness No. 5, p. 28.) But this evidence would at most prove that the property, though held as a raj, belonged to a joint family, of which, not invariably the eldest son of the last holder, but the most competent male member, was entitled to succeed as raja; and, further, that the original possessions of the family, *viz.*, those held by Jye Singh, had been the subject of partition.

On the whole, whatever may have been the earlier history of the estate, which was, at most, only a sub-tenure of some kind under the Raja of Beerbhoom, there seems to their Lordships to be no sufficient ground for disturbing the conclusion of the High Court, that, since the resumption, it is to be treated as subject to the general law of succession.

The result of this is that, if there are no legitimate descendants of Soomaer Singh, other than the respondent and the appellant, the respondent is entitled in any case to recover half the estate; and, if the general law of succession is that of the Mitakshara, to recover the whole.

What, then, is the general law of inheritance by which the case is to be governed?

The High Court applied the law of the Mitakshara as that which undoubtedly rules in Zillah Bhaugulpore; and refused to listen to the plea founded on the transfer of Tuppa Belputta from Beerbhoom to Bhaugulpore in 1795, treating it as "started at the eleventh hour on appeal." This last position is not, in their Lordships' view, correct; because the point is expressly taken by the Principal Sudder Ameen in his judgment, and seems to have been one ground of his decision. (See page 77, line 40.)

The applicability of the Dayabhaga to the case may depend upon either of two circumstances. It may be that the whole of the transferred district has continued to be governed by its old law, in which case the law would be an exceptional local law; or the particular family, though now domiciled in a zillah governed by the Mitakshara Law, may have continued to retain the law of the Bengal School as an exceptional family-law. If the first state of things exists, the fact must be notorious to those who administer justice in that part of the country. The second state of things would require to be shown by evidence, and the record contains no evidence on this point. Nor the pleadings and issues being what they are, co it be expected to do so?

The two lower Courts being, in fact, conflict as to the law applicable to the c and the question having been insufficie tried, it seems to their Lordships desira to remand the cause for further inquiry this point.

The case has hitherto been dealt with if there could be no dispute as to the p perty, except between the appellant respondent. The High Court has alr assumed this to be so, remarking, incid tally (page 82, line 55), that, of the four s of Soomaer, other than Manick, Pirthee the only survivor. On the argument of appellant, however, it was shown that, the face of the oral evidence given for respondent, it was stated that, of these so Teeluck at least was legitimate, and had issue (see pp. 24 and 25). This fact, true, would affect the original shares of respondent and Durbejoy in Soomaer's esta though, unless Teeluck outlived Durbej it would not affect the respondent's right succeed to that person's share, whatever may have been.

The respondent, having to recover by for of his own title, is bound to show that whole inheritance of Soomaer is, accordi to the law of the Mitakshara, now vested him; and his own evidence leaves so mu doubt on this point, that a remand upon also seems to be necessary.

The learned Counsel for the appella sought also to set up a *jus tertii* as regard some of the earlier generations of this family appearing in the Genealogical Table at pa 80. It seems to be clear that there was partition of some kind amongst the sons the original ancestor Jye Singh; but it not so clear that the share of Tribhoobun one of these sons, was ever divided among Soomaer and his other sons.

Their Lordships, however, are not disposed to invite litigation, by extending the inquiry beyond the descendants of Soomaer. Both parties have come into Court representing him to have been the sole owner of the estate; and if there were co-sharers with him, and there are now descendants of such co-sharers, it will be open to them, whatever may be the result of this suit, to assert their title in another and independent suit.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the decree under appeal in so far as it declares that the respondent was the legitimate son of Soomaer Singh; to reverse the rest of the sa

h

ee; and to remand the cause to the h Court, with directions to determine appeal from the decree of the Principal der Ameen, pursuant to the provisions of on 354 of Act VIII. of 1859, after ing the following issues to be tried, :—

st.—Whether Soomaer Singh left any what legitimate sons, other than Manick h, in the pleadings mentioned, and the ondent; and, if so, whether they are g or dead; and, if any of them are dead, n they respectively died, and whether have left any and what male descend-

ndly.—Whether the estate of Soomaer h, which was formerly within the limits illah Beerbhoom, having been transferred illah Bhaugulpore, the succession there- becomes liable to be regulated by the law the Mitakshara; or whether, by reason any local or family-custom, such succes- n, notwithstanding the transfer, continues be governed by the law of the Dayabhaga.

Their Lordships will also recommend that e costs of this appeal on both sides be ed; and that the amount of such taxed sts be certified to the High Court, and be alt with by that Court as part of the costs the cause.

The 20th November 1873.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

ecution-sale—Misdescription—Acquiescence.

Case No. 56 of 1873.

pecial Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 1st October 1872, affirming a decision of the Moonsiff of that District, dated the 23rd November 1871.

Taranath Chuckerbutty and another (Plaintiffs), *Appellants,*

versus

Joy Soonduree Dabee (Defendant), *Respondent.*

Baboo Mohinee Mohun Roy for Appellants.

Baboos Bhyrub Chunder Banerjee and *Issur Chunder Chuckerbutty* for Respondent.

A mere verbal error in the proceedings connected with attachment and sale of the property in execution of a decree, if it introduces no doubt as to what the Court intended to deal with, is not such a misdescription as will in any way defeat the auction-purchaser's rights.

Where a sale has been allowed to be completed by the Court without any opposition on the part of the judgment-debtor, who is cognizant of proceedings, and accepts them so far as to petition for an extension of time, the sale ought not to be treated as a nullity.

Ainslie, J.—It appears that a certain mowrosee ijara of 7 annas of Turuf Seedakalee was situated within the zemindaree of a 7-annas share of Pergunnah Lushkerpore, the rent of this ijara being Rs. 194-2 sicca, equivalent to Rs. 213-10 of the present currency. Subsequently, the 7-annas share of Lushkerpore was divided into three estates: one portion, consisting of 4 annas 13 gundas 1 cowrie 1 krant, was held by Rajah Poresh Narain Roy; the 2nd, consisting of 1 anna 3 gundas 1 cowrie 1 krant, by Hur Sunkur Sandyal and others; and the 3rd, also of 1 anna 3 gundas 1 cowrie 1 krant, by Kooer Nujender Narain and others. For some reason, which it is not necessary to inquire into, the subordinate talook, the mowrosee ijara, was similarly divided, and the rent was apportioned in three shares. The plaintiff claims, by purchase at an execution-sale, one-third of the two first shares of the ijara, namely, that situated within the estate of Rajah Poresh Narain Roy and that situated within the estate of Hur Sunkur Sandyal. These shares were sold in execution of a decree obtained by one Nita Kalee Dabea. The proceedings in the execution-suit have described the property sold as a putnee talook bearing a jumma of Rs. 52-5 in the share of Hur Sunkur Sandyal, and a putnee talook bearing a jumma of Rs. 233 in the share of the Rajah. On a suit for rent being brought by the plaintiff, the defendant intervened and denied the title of the plaintiff *in toto*. Hence this suit was brought, and it is now contended that, as the property belonging to Joy Soonduree was a mowrosee ijara, and as the property purporting to be sold to the plaintiff in execution of the decree was a putnee talook, nothing whatever passed by that sale. The question seems to us to come to this—whether there was such a misdescription in the proceedings connected with the attachment and sale as might introduce a doubt as to what it was intended by the Court to deal with. If there is no such doubt, then we take it that a mere verbal error will, in no way, defeat the auction-purchaser's rights. In considering whether there was any ambiguity, we must look to the proceedings of the defendant herself on the

18th of January 1868, when her property was under attachment, and was about to be put up for sale. She then came forward in Court; she admitted that her property was under attachment, and she said nothing about the proposed sale being irregular; in fact, she would appear to have tacitly conceded its regularity by asking for an extension of time for paying up the money decreed against her. Then, although it is said that Joy Soonduree has a putnee talook within Seedakalee, yet it is admitted that she has no such talook within the shares of Rajah Poresh Narain Roy and Hur Sunkur Sandyal. We think that, where a sale has been allowed to be completed by the Court without any opposition on the part of the judgment-debtor, although that judgment-debtor was in Court, was perfectly cognizant of the state of affairs, and accepted them so far as to petition merely for an extension of time, the auction-purchaser ought to be protected, if possible, and the sale ought not to be treated as a nullity.

This view is supported by a judgment delivered by myself and concurred in by Mr. Justice Elphinstone Jackson to be found in the 15th Weekly Reporter, page 490.

A judgment, in the 18th Weekly Reporter, page 56, of a Bench consisting of the learned Chief Justice and myself, has been cited as opposed to this; but it seems to me that there is a very marked difference between the two cases. In this case there certainly was an attachment of the properties of Joy Soonduree, and an attachment of properties of Joy Soonduree situated within certain specified shares of Pergunnah Lushkerpore. There was no other property within these shares which any person could suppose that the judgment-creditor intended to proceed against; but, in the case in the 18th Weekly Reporter, we find that it was attempted to extend the sale of the rights and interests of two persons named so as to make it include the rights and interests of sundry persons not named. Now it is a very common thing for a judgment-creditor to proceed against one or several out of many judgment-debtors, and unless he specifies the names of the parties against whom he is proceeding, it is quite impossible for anybody, either Court or intending purchaser, to suppose that anything is being sold except the properties of the parties named.

We are, therefore, of opinion that the judgment of the Court below should be reversed, and that the plaintiff should obtain a decree declaring his right in one-third of the mowrosee ijara formerly held by Soonduree, and situated within the share Rajah Poresh Narain Roy and Hur Su Sandyal, in Pergunnah Lushkerpore, costs.

The 9th December 1873.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, C *Justice*, and the Hon'ble F. B. Ke Louis S. Jackson, F. A. Glover, and Pontifex, *Judges*.

Sale of Tenure for Arrears of Rent—Act X 1859, ss. 105 & 106.

Case No. 1525 of 1872.

Special Appeal from a decision passed the Officiating Judge of Dacca, dated 27th June 1872, reversing a decision the Subordinate Judge of that Distri dated the 21st December 1871.

Sham Chand Koondoo and others (Plaintiffs) *Appellants*,

versus

Brojonath Pal Chowdhry and others (Defendants), *Respondents*.

Baboos Chunder Madhub Ghose, Bungs Dhur Sen, and *Juggut Doollubh Bys* for Appellants.

Baboos Gopal Lall Mitter, Obhoy Chu Bose, Kalee Mohun Doss, Hem Chund Banerjee, Doorga Mohun Doss, Bam Churn Banerjee, and *Bhowanee Chu Dutt* for Respondents.

A zemindar who has obtained a decree for arrears rent of a transferable tenure is entitled to sell th tenure; and a person, who has obtained a transfer such tenure which he has not registered, and cann show a sufficient cause for not registering it, is boun by the sale, and cannot set up a title which he ha acquired by a previous sale.

This case was referred to the Full Ben on the 24th July 1873 by Jackson an Birch, JJ., with the following remarks:—

Jackson, J.—We think the point involve in this case should be referred to a Fu Bench for decision, and the point to b referred should be this: The plaintiffs pur chased, on the 19th February 1866, th right, title, and interest of Brojonath Pa and others in a certain jote which, it i admitted, is a transferable under-tenure That sale was not confirmed, and therefor did not become absolute and final, until th

d June. Intermediately, the zemindar ght a suit against the jotedars whose s had been sold for arrears of rent, and ing recovered a decree against them, ued the tenure to be put up to sale; and it s sold accordingly on the 4th June, that o say, 19 days before the confirmation of sale to the plaintiffs. The purchaser was Kedar Nath, who afterwards conveyed rights to Menoka Dossee, one of the endants. The transfer under the circumce was not registered; neither did the ntiffs make any deposit of the rent due allowed by section 6 of Act VIII. of 5 (B. C.). Are the plaintiffs entitled to session of the jote, notwithstanding the e of it in the rent-suit?

The cases which have been referred to, d from which the conflict arises, are on the e of the plaintiffs,—

10 Weekly Reporter, pp. 434, 446.
13 Weekly Reporter, p. 449.
3 B. L. Reports, p. 49, App. Civil.
15 Weekly Reporter, p. 341.
17 Weekly Reporter, p. 417, and also judgment of the Judicial Committee rinted at page 195 of the same volume.

On the side of the defendants are,—

2 Weekly Reporter, p. 131.
5 Weekly Reporter, p. 205.
6 Weekly Reporter, p. 59, a ruling by he Full Bench, which, however, does not ppear to bear distinctly on the point.
Sutherland's Reports for 1864, page 48, Act X. Rulings.
15 Weekly Reporter, p. 99.
17 Weekly Reporter, p. 352, and finally a quite recent judgment of the present learned Chief Justice and Mr. Justice Glover in Special Appeal No. 911 of 1872.*

The judgments of the Full Bench were delivered as follow by—

Couch, C.J.—The decision of the present question depends, in my opinion, upon the construction which is to be put upon sections 105 and 106 of Act X. of 1859. These sections, I think, must be read together, forming, as they do, a provision for the sale of transferable tenures in execution of decrees for arrears of rent.

Section 105 says that if there is a decree for arrears of rent due in respect of an under-tenure, which, by the title-deeds or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree, according to the rules for the sale of under-tenures, for the recovery of arrears of rent due in respect thereof contained in any law for the time being in force.

By 'tenure' is meant, not the right or interest of any person in the land, but the holding or the interest which has been created by the lease; and giving to the word its plain and ordinary meaning, it is that which is to be sold. If this had not been intended, and the person who obtained a decree for rent was to be only entitled to sell the right and interest of the person against whom the decree was obtained, it would not have been necessary to make the provision in this section, as the decree might be executed upon all his property in the same manner as any other decree. It seems to be that by providing that the tenure shall be sold, more was meant than selling what is the property of the person against whom the decree had been obtained. And the words "according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof," may assist us in coming to this conclusion. The rent is not regarded as due from the person against whom the decree is obtained, but as due in respect of the tenure.

The words in the latter part of the section, "other property," do not appear to me to limit the meaning of the first part. In many, if not in most cases, the tenure would be the property of the person against whom the decree is obtained; and then the words "other property moveable or immoveable" belonging to the judgment-debtor, would not be inappropriate. I think it would be giving too great an effect to the words "other property" to say that they show that the intention of the Legislature was, not that the whole of the tenure should be sold, but only the right and interest of the judgment-debtor in it. When we compare the words of Act X. with those of the Regulation which was repealed by it, and for which the provisions in Act X. were substituted, it seems that some alteration of the law was intended. Act X. professes to be an Act to amend the law, and not merely a consolidating Act. Many provisions in the Regulation are repealed, and others are substituted for them. The part of the 7th clause of section 15 of Regulation VII. of 1799 which would be applicable to the present question says: "If the defaulter be a "dependent talookdar or the holder of any "other tenure, which, by the title-deeds or "established usage of the country, is trans-

* 20 W. R. 59.

"ferable by sale or otherwise, it may be "brought to sale by application to the "Dewanny Adawlut, in satisfaction of the "arrear of rent." This authorizes the sale where the defaulter, the person against whom a decree might be obtained, is the holder of the tenure. The Judicial Committee of the Privy Council, in the case in 17 Weekly Reporter, allude to these words, and consider that they are very material as to what cases were within the Regulation. They say (page 200): "They "were not the holders of any tenure, to use "the words of Regulation VII. of 1799, and "were certainly not proprietors, in the "words of the Regulation VII. of 1819." In Act X., words which are capable of a much wider meaning are substituted for the words of the Regulation. The Act says generally that if there is a decree for arrears of rent, the tenure may be sold. There are no words limiting it to a decree obtained against the person who is at the time the holder of the tenure.

There is another difference between the Act and the Regulation which shows that it was the intention of the Legislature to give to the zemindars a more effectual remedy than they possessed before. The 8th clause of section 15 of the Regulation directs that transfers shall be registered: "As a further "security to the zemindars in maintaining "their rights over the dependent talookdars "continued under them, the latter are hereby "required to register in the sudder cut-"cherry of the zemindaree to which their "talooks may be attached, all transfers of "such talooks, or portions of them, by sale, "gift, or otherwise, as well as all successions "thereto, and divisions among heirs in cases "of inheritance." But it does not provide, as Act X. does in the proviso to section 106, that no transfer which is required to be registered shall be recognized, unless it has been so registered, or unless sufficient cause for non-registration be shown to the satisfaction of the Collector. More stringent provisions in favour of zemindars are inserted in Act X. of 1859 than in the Regulation. It appears to me, taking sections 105 and 106 together with the proviso, that it was intended that the zemindar should be at liberty to treat as the holder of the tenure, and the person whom he might sue for the arrears of rent, the person who is registered in his books as the owner, unless any one could show that there had been a transfer, and that there was sufficient cause for its non-registration. In such a case a zemindar might find that he h been suing the wrong person. Taking th sections together, I think that the zemin having obtained a decree for arrears of r is entitled to sell the tenure; and that person, who has obtained a transfer which has not registered, and cannot show a su cient cause for not registering it, is bound the sale, and cannot set up a title which has acquired by a previous sale.

Section 106 appears to provide for c where the zemindar has sued the wr person. The real proprietor may come upon the condition of depositing the amo of the decree, and may show that he was owner of the tenure, and should have h sued. That is a wholesome provision; fo suit might be brought collusively, and a dec for the arrears of rent might be obtained, a the tenure be sold without the real proprie being able to show that, in fact, the amo claimed were not due.

The opinion that I now state, and which stated in a former case when I sat with J Justice Glover, is in accordance with t earlier decisions of this Court. And in t conflict of opinion which there is among the learned Judges of this Court, it is sat factory for me to find that in the earlier ca the same was decided as I now propose th we should decide.

In the case in the 7 Weekly Reporte which is a Full Bench Ruling, the late learne Chief Justice, no doubt, appears to ha expressed an opinion contrary to this; b it does not seem to me that the decision the was upon the question which is now befo us. The cases in this Court in which th question had been decided were not referr to in that case, and were not in any way th ground of the reference to the Full Bench From this I conclude that it was not the intended to refer the present question What was referred was the question as t incumbrances, although, no doubt, the Chie Justice expressed an opinion on the questio now before us. On the other hand, in the 6 Weekly Reporter, page 54, which wa also a Full Bench case, Sir Barnes Peacock appears, so far as we can gather from hi language, to have been of the same opinion as myself. Under those circumstances, it seems to me that we are not bound by the decision of the Full Bench in the 7 Weekly Reporter, and I think the question now comes properly before this Full Bench to determine it independently of any previous decision of this Court. Looking at it as a question under the Act, I think the answer

ght to be that the sale under the Act did fer a complete title upon the purchaser.

Kemp, J.—I concur.

Jackson, J.—I am of the same opinion the learned Chief Justice. I also think we are not concluded by the judgment the Full Bench in the case in 7 Weekly porter. The decision of the Full Bench that occasion appears rather to have been ecision upon a nearly similar point on a erent ground than a decision upon the stion now before us. If it were other-e, no doubt under the rules for references he Full Bench, we should probably have govern ourselves by that decision. The plest and only safe mode of deciding the tion before us appears to be upon the struction of sections 105 and 106 of Act of 1859, taking those sections along with other sections of the Act. The modes executing decrees passed under Act X. re originally pointed out in the sec-ns commencing with section 86 of that t. The 86th section has been repealed, d is replaced by section 17 of Act I. of 1862 (B. C.). That section declares nerally what the procedure open to a ecree-holder is, in these words: "Process of execution in any suit hereafter to be instituted under this Act, or under Act X. of 1859, may be issued against either the person or the property of a judgment-debtor, but process shall not be issued simultaneously against both person and property."

Then in some of the subsequent sections articular remedies or modes of procedure re indicated in particular cases. Accord-gly, section 105 enacts: "If the decree be for an arrear of rent in respect of an under-tenure, which by the title deeds, or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure," &c. There is a limitation of that in section 108, where the person who has obtained the decree is a sharer in a joint undivided estate; other-wise, subject to the claim to be made under section 106, the decree-holder might apply for sale and the Court might proceed to sell the under-tenure. That procedure is quite separate from the course to be taken in re-spect of other immoveable property in re-spect of which I conclude the Court would sell the right, title, and interest of the judg-ment-debtor; but under sections 105 and 106 the tenure itself, I take it, is the thing to be sold. It is to be observed that the position of a claimant under section 106, and what the claimant has to do, are quite distinct from those of a claimant under the other section of the Act. A claimant under section 106 is to allege that he is the proprietor of the under-tenure and was in lawful possession of it, and has to deposit in Court the amount of the decree. That is provided in respect of claimants with regard to under-tenures; and taking all the provisions of these two sections together, it seems to me clear that the Legislature contemplated a separate procedure, and intended that the Court should go on to the sale of the under-tenure itself. I concur, therefore, in thinking that the under-tenure in this case was liable to be sold, and that the plaintiff could not by reason of his intermediate purchase at a sale in execution of a decree of the Civil Court recover the under-tenure from the party who had purchased it at a sale under Act X.

Glover, J.—I concur with the learned Chief Justice.

Pontifex, J.—I agree with the learned Chief Justice.

Couch, C.J.—The special appeal will be dismissed with costs.

The 27th November 1873.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Execution-proceedings—Bona Fides—Limitation—Mistake.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Benoderam Sein and others

versus

Brojendro Narain Roy.

Mr. Doyne for the Appellants.

Mr. J. Cutler for the Respondent.

Where a charge is made of want of *bona fides*, it lies upon the party making that charge to substantiate it by evidence satisfactory to those who have to decide the question.

In considering whether certain execution-proceedings were *bond fide* or not, their Lordships did not

* From the judgment of L. S. Jackson and Markby, JJ., in Miscellaneous Regular Appeal No. 46 of 1869, decided 20th March 1869, 11 W. R. 269.

confine themselves to one particular attempt to revive execution, but felt bound to look at the whole course of the proceedings: and where they found that the first proceeding had been prosecuted with effect, and that in a third attempt against which the judgment-debtor set up limitation the decree-holder had successfully opposed him in two Courts, their Lordships thought there was strong evidence of a *bonâ-fide* desire to execute the decree.

Even where a proceeding is ineffectual because of some mistake in the particular step advised, if it was taken to enforce the decree it protects the decree-holder from the operation of the statute of limitations.

THIS was an appeal from a decree of the High Court of Judicature at Calcutta, dated the 20th of March 1869, reversing a judgment of the Principal Sudder Ameen of Beerbhoom, dated the 1st of December 1868. Such judgment and decree were respectively given and passed in an execution-case wherein the present appellants except Gunesh Chunder Sein and Brojomohun Sein, the predecessor in title of the last-mentioned appellant, were decree-holders, and the present respondent was judgment-debtor.

By a decision and decree of the Judge of the Civil Court of Zillah Beerbhoom, dated the 5th of April 1855, and made in a suit wherein the appellant, Benoderam Sein and others, were plaintiffs, and Chundernarain Roy was defendant, a sum of Rs. 7,460-8, together with Rs. 542-10 as costs, was decreed to be paid by the defendant to the plaintiffs.

On the 6th of August 1857, a petition for execution of the last-mentioned decree was filed by the then decree-holders, praying that the amount of such decree might be realized by attachment and sale of the properties scheduled to the petition. On the 23rd of October 1859, it was ordered that notice should be issued upon the judgment-debtor, and orders were subsequently made for the attachment and sale of part of the said property; and on the 5th of April 1858, the same was sold by auction for Rs. 6,550. On the 8th of January 1859, an order was duly made confirming the said sale. The said sum of Rs. 6,550 was in due course received by the decree-holders, and on the 26th of March 1859 an order was made to strike the case off the file.

On the 31st of December 1861, the decree-holders presented a petition for the revival of execution of the said decree, claiming Rs. 5,114-2, and praying that the judgment-debtor might be summoned and ordered to pay the said amount due, with interest till the date of realization and costs. On the 13th of April 1863, the Principal Sudder Ameen of Zillah Beerbhoom made an order for sending the papers in the c to the Court of the Judge of Zil Moorshedabad. The papers were acco ingly so sent, and on the 29th of A 1863 the last-mentioned Judge made order, under section 216 of the Code Civil Procedure, for the service of a no upon the judgment-debtor. The notice served by a copy thereof being stuck up the front door of the house of the judgme debtor. On the 6th of May 1863, Principal Sudder Ameen of Zillah Be bhoom made an order "that the vakeel the decree-holders do take the best step knows in the course of three days." the 11th of August 1863, the said Princi Sudder Ameen made an order in the follo ing terms: "Whereas the vakeel of "decree-holders did neither furnish the "of properties nor take any other step up "this day, hence it is ordered that at pres "the case be struck off from the arrear fil On the 23rd of March 1865, anot petition for the revival and execution of t decree was filed in the Court of t Principal Sudder Ameen of Zillah Beerbho by Benoderam Sein, Brojomohun Se Nittyanund Sein, and Boidonauth Sein, decree-holders, against Chundernarain, a after his demise, this respondent, as his so and-heir, as judgment-debtor, praying th the case be revived, and the decretal amou be ordered to be given to the decree-holde after realizing the same by public sale of t properties left by the judgment-debtor. O the 2nd of September 1865, the Princip Sudder Ameen ordered that a notice sho be issued. On the 31st of May 1866, t Principal Sudder Ameen made an ord for sending the necessary papers, togeth with a certificate, to the Zillah Judge Dinagepore for execution of the said decree and that the execution-case should be struc off in the Court of Zillah Beerbhoom.

The case was subsequently struck o from the file of the Court at Dinagepo for default. On the 25th March 1867, th decree-holders took proceedings in th Court of Dinagepore to revive execution o the decree, and the judgment-debtor having notice, appeared both in the Court of Beer bhoom and in the Court of Dinagepore, and in both objected that execution of the decree was barred by limitation. On the 29th of June 1867, the Judge of Beerbhoom overruled the objection. The Judge of Dinagepore allowed the objection, and refused to execute the decree. The decree-holders appealed to the High Court at Calcu

ainst the decision of the last-mentioned dge, and the appeal was on the 11th of y 1868 heard by Mr. Justice Loch and r. Justice Glover, who ruled that the dge ought not to have admitted and adjuated upon the application, and held that order refusing to execute the decree st stand, with liberty for the decreeders to apply to the Court which passed decree, but they set aside the judgment the point of limitation on the ground that Judge ought not to have entered into it.

On the 18th of May 1868, the appelts, except Gunesh Chunder Sein and ojomohun Sein, field a petition against respondent as judgment-debtor in the rt of the Subordinate Judge of Zillah erbhoom, praying that, after having served ice upon the judgment-debtor, an order passed for duly sending a certificate to Court of the Judge of Dinagepore the attachment and sale of the property ich had been previously attached. On the th of July 1868, notice of the applition was served on the respondent. On e 7th of August 1868, the respondent ed a petition by which he set up the plea limitation.

The Subordinate Judge rejected the plea, d ordered that a certificate be sent.

The High Court on appeal reversed the cision of the lower Court, and held that ecution of the decree was barred.

Mr. Doyne, for the appellant, contended at execution was not barred, and that all e appellant's proceedings to obtain execuon were *bond fide*. He relied upon the dgment of the Judicial Committee in Maarajah Mahtab Chand Bahadoor *vs.* Bulram ng (13 Moore's Indian Appeals, 479; . C., 14 Weekly Reporter, P. C., 21).

Mr. John Cutler, for the respondent, ontended that the proceedings of the ppellant were not taken *bond fide*, and herefore could not keep the decree in force; hat, if execution were once barred, it could ot be revived (Ram Dhun Roy *vs.* Khajah bdool Gunnee, 9 W. R. 390); and that t was barred in this case by the interval hat elapsed between the 26th of March 859 and the 23rd of March 1865, the proceedings of the 31st of December 1861 not eing *bond-fide* proceedings.

Sir Montague Smith delivered the following judgment:—

This appeal arises out of execution-proceedings which were taken to obtain execution of a judgment obtained by the appellants against Chundernarain Roy, the father of the respondent.

The original judgment is dated on the 5th April 1855, and was obtained in the Civil Court of Zillah Beerbhoom for Rs. 7,400 and costs.

The only question which arises is whether the proceedings in execution, which were commenced on the 18th May 1868, are barred by the operation of the 20th section of the Limitation Act, XIV. of 1859. The ground on which it is urged that limitation is a bar is, that no proceeding had been taken to enforce the judgment within three years next preceding the application for execution in 1868 within the meaning of the Act.

Now, unfortunately for the appellant, in this case he has been obliged to resort to no less than four different attempts to obtain execution of his judgment. The first effort he made was to a certain extent fruitful and successful, for he obtained a sum of Rs. 6,650 in part satisfaction of his judgment. The proceedings in which that sum was realized commenced on the 6th August 1857, and it appears from the schedule to the petition to obtain execution in that year that he sought to attach three estates, one in Zillah Beerbhoom, and two in Zillah Moorshedabad. The Court, rightly or wrongly, put him to his election whether he would take out execution first against the estate in Zillah Beerbhoom, or in the other Zillah. It appears that he elected to attach the estate in Zillah Beerbhoom; and having attached it, proceedings were taken by the defendant to obstruct that execution—proceedings which went to the High Court. Those proceedings were undoubtedly prosecuted by the plaintiff in a vigorous manner and with success, for he obtained ultimately the sale of the estate, and under that sale obtained payment of the sum already adverted to. But it appears that the obstruction opposed by the defendant delayed that payment until the 17th March 1859. The execution-proceeding was then at an end so far as that estate was concerned, and on the 26th March of that year it was struck off the file.

The next proceeding is on the 31st December 1861. That was, undoubtedly, within three years of the former. The execution was commenced by petition, praying for the arrest of the defendant. It appears there was then remaining due on the judgment for principal and interest a sum of upwards of Rs. 5,000. The application being more than a year after the date of the last order in execution, the Court required that notice

should be served upon the defendant in pursuance of section 216 of Act VIII. of 1859, and it appears that a formal notice was issued by the Court on the 13th April 1863, which was sent to Moorshedabad for service. It was put into the hands of the regular officer of the Court, and the Nazir made a report to the Court that he had in vain endeavoured to effect personal service of it. but had affixed it to the front door of the defendant's house. That report was in May 1863. It seems that no arrest was made. Why it was not made does not certainly appear, but the plaintiff apparently desired to effect the arrest. If he did not mean to arrest the defendant, why did he obtain the order, get it transferred to Moorshedabad, and go to the expense of paying the fees of the officer for executing it? It may be that there is not sufficient to show that the defendant was absconding, but there is nothing to show that he was in the way; and when the charge is made of want of *bona fides*, it certainly lies upon the party making that charge to substantiate it by evidence satisfactory to those who have to decide the question.

This last proceeding was, undoubtedly, abortive, but within three years of the report of the Nazir, that is, on the 23rd March 1865, the defendant having died in the interval, a fresh petition to execute the decree by an attachment and sale of some property in Zillah Dinagepore was presented. It was presented to the Judge of Beerbhoom who made an order, of the date of the 31st July 1866, that copies of the decree and the application for execution should be sent to Dinagepore in order that the Judge there might execute it. It seems that the decree was taken there, and then began proceedings, which emanated from the defendant, to set aside the execution on the ground that it was barred by limitation. The Judge at Dinagepore decided that limitation was a bar. There was an appeal to the High Court by the present appellant, and he was successful in that appeal. The High Court reversed the order below on the ground that the Judge at Dinagepore had no authority to make it. In the meantime, pending that appeal, the defendant presented a petition to the Judge of Beerbhoom, praying that the proceedings might be dismissed on the ground that they were barred by limitation. The Judge of Beerbhoom decided, upon the issue raised on that petition and the petition in answer, that the proceedings were not barred by limitation. His order rejecting the objection was made on the 29th June 1867, and in May 1868 the present proceedings were commenced.

Now, it was not contended by Mr. Cu that there was an interval of three ye between the proceedings which have be narrated, and which were taken on the p of the appellant; but his sole contenti before their Lordships to-day was that th proceedings were not *bonâ fide*, and wh pressed during the argument to show in wh respect they were not *bonâ fide*, and to wh particular proceedings he alluded as open that charge, he referred to those of 18 which were commenced by the petition pr ing for the arrest. He says that those p ceedings were not *bonâ fide*, first, becau there was delay to take them after 18 next, that the defendant was not arreste thirdly, that the plaintiff petitioned for arrest instead of an attachment.

The delay may have been caused by plaintiff making inquiries about the defe ant's property before applying for an arr Probably, though he had inserted in schedule estates in Moorshedabad of wh he had some knowledge, there was difficu in reaching them, and he may have thou that if he arrested the defendant, he mig obtain payment under the compulsion of t arrest. At all events it is a probable so tion of the delay. He may have thou that instead of incurring the difficulty following the estates, perhaps in other nam it would be a more cogent mode of obtaini the money to arrest the defendant.

Their Lordships, in considering wheth these proceedings were *bonâ fide* or n cannot be confined to this particular attem to revive the execution in 1861, but mu look at the whole course of the proceedings and when they find that the first proceedi to obtain execution was not only prosecute but prosecuted with effect, and a large su obtained; when they find also that in th third attempt, when the defendant set up th defence of limitation and attempted to ba the proceeding, the appellant opposed hi and successfully opposed him, in two Cour going up to the High Court; they think th case affords strong evidence of a *bonâ-fi* desire to execute his decree, which w thwarted and baffled by the defendant.

Their Lordships are unable to concur the view taken by Mr. Justice Markby th these proceedings appear to have been take merely to keep the decree alive for som ulterior purpose. The learned Judge do not explain what ulterior purpose he sup poses the plaintiff had in view, nor does

h

gest any. There is no doubt it would be
t he calls a "nefarious practice" for
ntiffs having decrees to keep them for
e wrong motive hanging over the heads
efendants; but there is not the slightest
ence that any such motive existed in this
.

heir Lordships therefore think that upon
facts there is not only an entire want of
f of *mala fides*, but strong evidence of
l and in some respects (though there are
ys which are not quite accounted for) a
uous prosecution of these proceedings.
heir Lordships find that Mr. Justice
son gave as one of his reasons for think-
he statute was a bar that "no steps of
ffectual kind were taken." Now it is
tly clear that the inquiry, whether the
taken were, in fact, effectual can only
aterial, provided the proceeding be in its
re one to enforce the judgment, so far as
y be an element in considering the ques-
of *bona fides*.

constantly happens in these executions
proceedings are taken which are ineffec-
because of some mistake in the particu-
ep which has been advised. The point
before this Committee last year in a case
Roy Dhunput Singh *vs.* Madhomotee
a. (The judgment was delivered on
2nd May 1872.)* In that case the
tiff had obtained two decrees. He had
hed some money under decree A, and
he filed a petition by mistake in suit B,
ing to have the attached amount paid out
m. When it came before the Court, the
t was pointed out, and the petition was
ourse abortive and ineffectual. In a
equent execution-suit under decree B, it
me necessary for the plaintiff to establish
he had taken a proceeding within three
s of the proceeding in execution which
as then prosecuting, and to rely upon
former abortive petition as a step to
ce the decree. This Committee held that,
ugh it had been of no avail by reason of
stake, it was a step which the plaintiff
taken to enforce his decree, and therefore
it did protect him from the operation of
Statute of Limitations.

or these reasons their Lordships will
bly advise Her Majesty to reverse the
ee of the High Court, to affirm the
ee of the Principal Sudder Ameen, and
rder that the respondent do pay the
s of this appeal and the costs in the
Court.

*18 W. R. 76.

The 11th December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Contracts—Specific performance—Misjoinder of Causes—Parties—Act VIII. of 1859, s. 15—Declaratory Decree.

Case No. 280 of 1872.

Regular Appeal from a decision passed by the Officiating Judge of Tirhoot, dated the 13th August 1872.

Ram Khelawun Singh and others (Plaintiffs), *Appellants,*

versus

Mussamut Oudh Kooer (Defendant), *Respondent.*

Baboos Chunder Madhub Ghose and *Boodh Sen Singh* for Appellants.

The Advocate-General and *Baboos Mohesh Chunder Chowdhry, Hem Chunder Banerjee*, and *Aubinash Chunder Banerjee* for Respondent.

The assignees (R K, K N, and G K) of certain property brought against the assignor (L B) and others a suit to obtain possession of a portion of assigned property of which he (L B) never had possession, and to obtain a declaration of right of ownership to the other portion already in the possession of one or more of themselves:

HELD that, as L B, at the time when the assignments were made, was not in either actual or constructive possession, he was unable thereby to pass the property, and that the bill of sale was only evidence of a contract to be performed in future upon the happening of a contingency:

HELD that, as the rights of R K and K N, who had given no consideration for the alleged contract, rested upon a different foundation from those of G K who had given consideration, the suit was bad for misjoinder of causes:

HELD that, even if G K could insist upon specific performance, yet, as it appeared from the contract that her vendor was L B *jointly* with R K, she could not have her right adjudicated in a suit in which L B alone was defendant.

A hostile act which would justify a declaration under Act VIII. of 1859, s. 15, must be such an act as would entitle the plaintiff to some substantial remedy in the way of injunction or otherwise.

Phear, J.—We think that the objection which has been raised by the learned Advocate-General must prevail.

The suit in its present form is in substance a suit brought by the assignees of one Lall Beharee Singh against Lall Beharee and others to obtain by virtue of his assignment to them possession of property, of which property Lall Beharee himself never at any time had had any sort of possession. The suit is in terms brought by them for the

purpose of obtaining possession of a portion of the assigned property, and also of obtaining a declaration of right of ownership to the other portion of which they say they or one of them are already in possession. The two decisions of the Privy Council which are respectively reported in the 11 Bengal Law Reports, page 36,* and 2 Bengal Law Reports, page 111,† appear to place the law which is applicable to the case in a clear light. The facts of the case upon which the earlier in date of these decisions was founded were shortly these: Rajah Proladh Singh, while out of possession of his property, and about to bring a suit to recover possession of it, in terms sold a share of the property to a person whose representative in the matter of this sale afterwards came to be one Budhu Singh. The Rajah's suit for recovery of the property eventually proved successful, and, after he had got into possession, Budhu Singh sued him to obtain the share which was the subject of the sale. The Privy Council held that the apparent sale of the share made by Proladh Singh, when he was out of possession, did not pass the property, but amounted at most to a contract to convey the share at some future period when he, the vendor, should be in possession; that Budhu Singh's suit must therefore be treated as a suit for specific performance; and that, inasmuch as he failed to show that either he or his assignor had paid the consideration-money, the suit must be dismissed. In the second of these cases, Jogessur Ghose, claiming to be entitled to certain property as heir of the deceased owner, and being about to institute a suit to obtain possession of it, made a contract with one Ranee Bhubo Soonduree Dossee, by which it was agreed that the suit should be instituted by both of them jointly as plaintiffs, and that whatever was recovered in it should be divided between them in a certain proportion. The suit was not instituted, but Jogessur obtained possession of part of the property by compromise with his opponent. Thereupon, Bhubo Soonduree brought a suit against both of them to obtain possession of the share of the property which she said Jogessur had sold to her. The Privy Council were of opinion that Jogessur's contract with her did not operate as a present transfer of the property "but as an agreement "to transfer so much of it as might be "recovered in a suit to be instituted to which "both Jogessur Ghose and the plaintiff "were to be parties." On this construc of the contract, the Privy Council held the plaintiff could not recover possessio the property against Jogessur though might be entitled to damages from him breach of contract; *à fortiori* she could recover from the other defendant who w stranger to the contract.

So here, inasmuch as Lall Beharee Sin at the time when the assignments to R Khelawun and Kirat Narain and Mussamut Gouree Kooer were made, not in either actual or constructive p session of the property, he was un thereby to pass the property itself to th persons. Under such circumstances, assignments and bill of sale were (to the language of the Privy Council, 2 Be Law Reports, page 117*) only evidence contracts to be performed in future, and u the happening of a contingency of which assignee or purchaser might claim a spec performance, if he came into Court show that he had himself done all that he bound to do. It is obvious on the facts this case that, before Lall Beharee can be a position to specifically perform his contra with the above-named plaintiffs, he must fi recover the property from Mussamut Ou Kooer by suit or otherwise. And possibl Court of Equity, in order to avoid circuity a multiplicity of actions, might rightly, und some circumstances, allow the plaintiffs in o action to sue Lall Beharee for specific pe formance of their contract with him, a also upon the footing of his right to s Mussamut Oudh Kooer to recover the prope needed for the performance of that contra The present suit, as the record now stand corresponds in form with a suit of that kin But, even if the facts were such as to justi us in dealing with it so, still the first poi which it is in such a suit incumbent upo the plaintiffs to establish, is their right t specific performances as against Lall Behare Now the rights of Ram Khelawun and Kir Narain against Lall Beharee rest upon different foundation from those of Mussam Gouree Kooer. It is therefore plain th the suit is bad for misjoinder of causes o action, and for that reason alone ought t have been rejected before hearing. If, how ever, we look at the case of Ram Khelawu and Kirat Narain against Lall Behare separately from that of the Mussamut, we se that these plaintiffs have no ground upo which they can compel Lall Beharee speci

* 18 W. R. 140.
† 12 W. R. (P. C.) 6.

* 12 W. R. (P. C.) 9.

ally to perform his contract with them. It is clear from their own statements in the plaint that there was no consideration for the alleged contract, and that Lall Beharee might withdraw from it at any time he chose before performance. Their suit against him therefore fails, and with it goes all claim to the property in the hands of Mussamut Oudh Koer. It follows that the whole suit for possession, so far as concerns these plaintiffs, was rightly dismissed. The case of Mussamut Gouree Kooer against Lall Beharee stands upon somewhat firmer ground than that of the misjoined co-plaintiffs. It is alleged in the plaint that she gave money-consideration for her purchase in the shape of Rs. 5,000, and that the whole of this had been paid. It is therefore possible that she is entitled to insist upon specific performance of her contract of purchase by her vendor. But it appears by the contract itself that this vendor is not Lall Beharee alone, but Lall Beharee jointly with Ram Khelawun. She cannot then have her right adjudicated upon in a suit wherein only Lall Beharee is a defendant, and the matter is certainly not mended by the fact that Ram Khelawun is a co-plaintiff with her. Consequently, as regards her, the suit must also be dismissed. But we think this ought to be without prejudice to her right, if any, to bring a fresh suit upon the same cause of action. Then, as to the claim on the part of Kirat Narain Singh for a declaration of right, we think that there is no ground whatever shown in the plaint upon which he or any of the plaintiffs are entitled to such a declaration. The plaint is entirely silent as to any acts of the defendant, or any conduct on the part of the defendant seriously threatening the right to the possession of any of the plaintiffs in Nos. 14 and 15. From some petitions which have been referred to, but which are not set out in the plaint, we learn that the defendant did, in general terms, on one occasion, deny Lall Beharee Singh's right to a certificate which would enable him (Lall Beharee) to recover the debts of one Joy Surun Dutt Singh, and also, at the same time, denied his title to the property which is the subject of this suit, including Nos. 14 and 15, as well as the rest. But a mere general denial of Lall Beharee's title on such an occasion as that is not a hostile act which would justify a Civil Court in issuing an injunction, or in taking any other measure for the protection of the proprietor. And it does not appear that this denial in any degree impeached Kirat Singh's right of possession. It has been long held in this Court that a hostile act, which is necessary to justify a declaration of right under section 15 of the Civil Procedure Code, must be one which would entitle the plaintiff to some substantial remedy in the way of injunction or otherwise, other than a mere declaration of right, if the Court thought proper to grant it. We therefore think that the whole claim fails, and that this appeal should be dismissed with costs, subject to the reservation in favour of Mussamut Gouree which has been already mentioned.

The 12th December 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Sales for Arrears of Revenue—Auction-purchaser's right to measure—Act VIII. (B.C.) of 1869, s. 38.

Case No. 241 of 1873.

Miscellaneous Regular Appeal from an order passed by the Collector of Chittagong, dated the 3rd April 1873.

Abdool Baree and others (Opposite Party), *Appellants,*

versus

Nittyanund Koondoo and others (Petitioners), *Respondents.*

Baboo Ram Chunder Mitter for Appellants.
Mr. Lowe and *Baboo Aukhil Chunder Sen* for Respondents.

Where an auction-purchaser, at a sale for arrears of Government revenue, applied, under Act VIII. (B.C.) of 1869, s. 38, for measurement of the purchased estate, and no objection was made in the first instance on the score of ability to measure by the ryots, HELD that the applicant's right to measure was undoubted.

Per Glover, J.—A zemindar cannot insist upon a measurement simply by alleging inability to measure, but must, in ordinary circumstances, prove such inability.

Kemp, J.—THE petitioners, respondents before this Court, purchased the property at a sale for arrears of Government revenue, and were placed in possession by the Collector. They then applied, under the provisions of section 38 of Act VIII. (B.C.) of 1869, to the Civil Court for a measurement of their purchased estate. The Civil Court, after taking into consideration the documents filed by the petitioners, which consisted of their sale-certificate and the return of the Collectorate officer who placed them in possession of the purchased estate, ordered the measurement to take place, and directed the Collector to undertake the duty. At first the ryots and other dependent talookdars petitioned stating

that the object of this application on the part of the auction-purchasers was to break up their tenures which existed from before the perpetual settlement, but they did not in their first application to the Court state that the petitioners were not unable to measure the lands, inasmuch as they were able to ascertain who were the parties liable to pay rent in respect of these lands. Subsequently, they expressed their willingness to point out the lands to the auction-purchasers. A considerable amount of official correspondence took place between the Subordinate Judge and the Collector, the Collector holding, and I think properly holding, that he was only acting ministerially in the matter, and that he was not a competent authority to dispose of the questions raised in the two petitions of the ryots. The case ended in a decision of the 3rd of April 1873 passed by the Collector, in which he directs that the measurement should be proceeded with. This being a regular appeal, I have briefly stated the facts of the case.

The grounds now taken are that, under the circumstances set forth in the petition of the appellants, of the 3rd of March 1873, the proprietors had no right to make a measurement under section 38 of Act VIII. (B.C.) of 1869; that it was only under particular circumstances that proceedings under that section can come into operation; and that, when these circumstances were denied by the petitioners, an issue ought to have been raised, evidence taken, and the point decided before the measurement was ordered to be made.

Speaking for myself, I am clearly of opinion that in this case the auction-purchasers were entitled to a measurement. Under section 25 of Act VIII. (B.C.) of 1869, every proprietor of an estate or tenure or other person in receipt of the rents of an estate or tenure, has the right of making a general survey and measurement of the lands comprised in such estate or tenure, or any part thereof, the only limitation to this power being when he is restrained from doing so by express engagement with the occupants of the lands. Such being the general right vested in the proprietor of an estate, the petitioners were competent to apply to the Court under section 38 for a measurement of the lands. That section lays down that, if the proprietor of an estate or tenure or other person entitled to receive the rents of an estate or tenure is unable to measure the lands comprised in such estate or tenure, or any part thereof, by reason that he cannot ascertain who are the persons liable to pay rent in respect of the lands, any part of the lands comprised there such proprietor or other person may ap to the Court for a measurement, and Court on such application *shall* order s lands to be measured. In the petit applying for a measurement the grounds the inability of the auction-purchaser measure are set forth very much in t words of the Act itself. As already state there was no objection in the first insta on the part of the ryots that the auct purchasers were able to measure the est as they were in a position to ascertain w were the persons liable to pay rents respect of the lands, and I do not find a provision in this section under which t Civil Court was bound to take evide before passing an order directing the m surement to take place; but, be that as may, in this case, I am clearly of opini that, inasmuch as no objection was made the score of ability to measure by the ryo and that any objection subsequently ma was an after-thought, the right of the pe tioners to measure is undoubted. Agai under section 2 of Act VIII. (B.C.) of 18 which was enacted to amend the procedure suits between landlord and tenant, every r is entitled to receive, from the person to wh the rent of the land held or cultivated him is payable, a pottah containing t quantity and boundaries of the land, t amount of annual rent, and the instalme in which the same is to be paid. Now, this case, which is the case of an auctio purchaser who must be completely abroad to the state of his purchased property, unle assisted by the late proprietor or by t amlah of the late proprietor, if a ryot w to apply to him under section 2, of the A for a pottah containing the quantity and t boundaries of the land occupied by him, the auction-purchaser, unless he has, unde section 38, a right to measure, would b unable to grant the pottah which the la directs him to give to the ryot.

For these reasons, I am of opinion that this appeal must be dismissed with cost payable by the appellants.

Glover, J.—The circumstances of this case are very exceptional, and therefore I do not wish to dissent from the decision which has just been given by Mr. Justice Kemp, but I wish to guard myself against being supposed to lay down the principle that any zemindar can insist upon a measurement simply by saying that he is unable to measure the land. I think under ordinary

umstances that he ought to prove his bility before he is entitled to ask for a surement under the section.

I concur in dismissing the appeal with s.

The 12th December 1873.

Present:

Hon'ble J. B. Phear and G. G. Morris, *Judges.*

ifariousness — Res-judicata—Act VIII. of 59, s. 2—Conveyance—Test of Bona Fides.

Case No. 226 of 1873.

cial Appeal from a decision passed by the Officiating Judge of Patna, dated the 13th September 1872, affirming a decision of the Sudder Moonsiff of that District, dated the 24th January 1872.

Futteh Singh (one of the Defendants), *Appellant,*

versus

ussamut Luchmee Kooer *alias* Bhugobutty Kooer (Plaintiff), *Respondent.*

Mr. M. M. Ghose and *Baboos Doorga Mohun Dass* and *Boodh Sein Singh for* Appellant.

Baboos Chunder Madhub Ghose and *Tarucknath Sen* for Respondent.

A suit dismissed for and on the cause of misjoinder f multifariousness, cannot be said to have been heard nd determined within the meaning of Act VIII. of 59, s. 2.

Where a deed of conveyance is signed and handed ver, the best mode of testing its *bona fides* is to crutinize the acts of the parties which follow, particularly whether consideration is given or possession aken.

Phear, J.—In this case some little difficulty occurred during the argument of the appeal in ascertaining what was the true nature of the plaintiff's suit; and we have since had the plaint translated in full. The translation is in these words: "Suit for obtaining "a decree for realization of decretal money, "principal with interest, and costs covered "by a decree dated the 30th of December "1869, passed on a bond dated the 30th July "1869, by an auction-sale of 3 cowries out of "5 cowries of Mouzah Makawan, Pergunnah "Eveatpore, held by defendant No. 1, pledged "in the bond, by setting aside a nominal and "fraudulent kobala dated the 2nd July "1869, set up by defendant No. 2 on the part of defendant No. 1, who, having "come to Patna, caused it to be executed "to defraud your petitioner and other "creditors; and also for setting aside a "miscellaneous proceeding dated the 26th "March 1870, allowing the objections of the "defendant No. 2 in execution-case, laid at "Rs. 831-5-9½, being the decretal money as "per account given below. The cause of "action arose from the date of the miscella-"neous proceeding allowing the objections "of the defendant No. 2. Before this, a suit "was brought for the reversal of the kobala "sought to be reversed in the present suit, "as well as a kobala set up by Kali Singh, "another purchaser. That suit was dismiss-"ed, as if it was struck off, on the 16th "August 1870, without trial. The present "suit is for the reversal of one kobala only. "It is prayed that a decree may be passed. "As your petitioner is an uneducated lady, "and her husband," &c., &c.

It seems to us that the suit on the face of this plaint is simply a suit to have it declared that the property which the plaintiff sought to take in execution for the purpose of getting satisfaction of a decree which he had obtained against the 1st defendant, Dabee Singh, was, at the time of his application for execution, the property of Dabee Singh, and liable to be taken in execution to satisfy his judgment-debtors.

It was argued on the part of the defendant that the suit was something more than this; that it was a suit upon the bond itself for the purpose of obtaining the benefit of the mortgage which was the object of that bond. But this could not be so for several reasons. In the first place, in this suit the plaintiff seeks to recover a sum of money which had been already decreed to him against Dabee Singh. If this had been a suit for the purpose of realizing the benefits of the bond, then one of the principal questions in this suit would have been what was the amount of the money secured by this bond, and what amount remained due thereon to the plaintiff at the time when the suit was brought. That question could not possibly have been determined by the previous decree for two substantial reasons: The first is that the previous decree was a decree against one of the present defendants only, namely, Dabee Singh; and the second reason is that that decree was merely a money-decree passed under the special provisions of the Registration Act upon the footing of a specially-registered bond. There could not, therefore, be any decree against the property itself. It amounted, at the most, to a decree

for a certain specified sum of money against Dabee Singh alone.

But, taking this plaint to be of the character which has already been described, it was first objected by the special appellant that it is barred by the effect of section 2 of the Civil Procedure Code.

On the face of the plaint itself, it appears that a previous suit was brought against Futteh Singh for substantially the same purpose as the present suit is brought, namely, to set aside the claim which the 2nd defendant, Futteh Singh, made to this property as against Dabee Singh upon the foundation of a deed of conveyance to him from Dabee Singh; and that this suit was dismissed on the 16th August 1870.

The plaint goes on to state that it was dismissed without trial; and we find from the decree itself, which is in evidence, that it was dismissed for misjoinder; it must rather have been for misjoinder, not of parties, but of distinct causes of action, which is in other words multifarious. There is no doubt, we understand, that this was the result of that suit; and the question now is whether, in the event of a suit being dismissed in that way and for that cause, the cause of action, upon which the suit was founded, has been heard and determined within the meaning of section 2 of the Civil Procedure Code.

It does not appear that there is any authority directly upon this point to be found in the decisions of our Courts. But we think, on referring to English authorities, that this dismissal of a suit for and on the cause of misjoinder or multifariousness is a disposing of the suit before hearing; and that the suit cannot, under those circumstances, be said to have been heard and determined. In the case of Powell *vs.* Cockerell, which is reported in 4 Hare's Reports, the suit had come on to be heard, and it was pleaded that it was multifarious.

The Vice-Chancellor says, page 562: "But, when the party does not demur for "multifariousness, it is not an objection "which he can, as of right, insist upon at "the hearing. At the hearing of the cause, "it very generally happens that one of the "mischiefs of multifariousness has been "incurred; and, if there is no future evil to "be incurred by it, there is no reason why the "Court should not exercise a discretion in "making or refusing to make a decree."

And the Vice-Chancellor previously, in the case of Benson *vs.* Hadfield, had come to the like conclusion. He there said that (page 40) "if the defendant does not r "the objection *in limine*, the Court, consi "ing the mischief as already incurred, "not, except in a special case, allow i "prevail at the hearing."

It seems to be clear then that the objec to a suit on the ground of multifarious or misjoinder of causes of action is objection to the hearing of the suit; an it prevails at whatever time, it has effect of preventing a determination as a hearing. Now, under the Procedure Ac 1859, the Court would have done be instead of dismissing the suit, to have sim rejected it. But the fact that the Court in form passed a decree dismissing the s does not alter the character of the determ ation. It seems to us that the suit has been, within the meaning of section 2 of Civil Procedure Code, heard and det mined. Accordingly, we think that t objection must fail, and that the pres suit taken in the shape which has be already mentioned, ought to have been fai heard and determined by the Courts belo

On looking at the judgment of the Low Appellate Court, we are not satisfied th the suit has there been in effect tried as suit of this kind. The simple issue whethe or not the plaintiff was entitled to take th property in execution as the property the 1st defendant, Dabee Singh, at the tim when he attached it in execution, has nev been distinctly framed and tried by eithe of the Courts; though, no doubt, we ca perceive from the judgment of the first Court that the principal facts relevant to this issue were, with a good many others not relevant, in contest between the parties at the trial before the Moonsiff. The Lower Appellate Court seems to have placed its decision mainly upon the suspicious circumstances which attended the execution of the deed put forward by the 2nd defendant as his title-deed, and came to the conclusion from general considerations only that this deed was a collusive deed fraudulently concocted in order to defeat creditors. It does not seem that the Court directed its attention very seriously to the question whether that deed was a binding deed as against the 1st defendant Dabee Singh, and did really pass to the 2nd defendant Dabee Singh's rights to the property. If it did, and if it were made prior to the plaintiff's attachment, then the plaintiff would have no right to take that property in execution of his decree. We suppose that there is no dispute about the genuineness of the document itself in this

ject, namely, that it is a document ally signed by the 1st defendant. The tion then seems to be, did the 1st endant by signing this document and hand- it over to the 2nd defendant pass to him proprietary rights in the property: was a real dealing with the property?

The best mode of testing this is to minize narrowly the acts of the parties ch followed upon the execution of the d; particularly to inquire whether any sideration existed or was given for this veyance; and again, whether the pur- ser upon the footing of this conveyance actual possession of the property.

These points do not appear to have been ticularly inquired into by the Lower pellate Court. The Judge makes a eral reference to the co-malik's evi- nce, but it is not clear that he came to conclusion of fact that Dabee Singh ceived the rents and profits of the property, ter his conveyance to Futteh Singh, in bstantially the same manner as he did fore; nor, indeed, that the co-malik's tes- mony goes to this extent.

On the whole, then, we think it best to verse the decision of the Lower Appellate ourt, and remand the case to that Court for -trial upon the issue which was first men- oned.

Costs will abide the event.

The 17th December 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Fraud—Limitation.

Case No. 396 of 1873.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 23rd September 1872, reversing a decision of the Moonsiff of Rungunnea, dated the 25th July 1872.

Jan Ali Chowdhry (Plaintiff), *Appellant,*

versus

Tarinee Churn Rukheet (Defendant), *Respondent.*

Baboo Aukhil Chunder Sen for Appellant.

Baboo Sreenath Banerjee for Respondent.

A suit against an agent for the recovery of money, under Act VIII. of 1869, s. 30, though brought within three years after the termination of the agency, was held to have been barred as not having been brought within a reasonable time from the date of the discovery of the fraud alleged against the agent.

Kemp, J.—THE plaintiff is the special appellant. It appears that he previously sued the defendant under section 30 of Act VIII. of 1869 (B.C.) for the delivery of accounts. In that suit it was found that the agency had determined more than one year before the suit was brought, and that suit was dismissed as barred. The plaintiff appealed to the High Court, and the High Court on the 30th July 1871 dismissed the special appeal. The present suit is brought also under section 30 for the recovery of money in the hands of the defendant as agent.

Now, as already observed, it was found in the former suit that the agency terminated in Aghran 1230 Muggee. The present suit is brought within three years it is true, but only after two years and several months had elapsed, and it was also found in the former case that after the determination of the agency in 1230, the plaintiff took charge of the estate, and appointed another tehsildar, who made the collections for the years 1230, 1231, and 1232 Muggee.

We therefore think with the Judge that the present suit for the recovery of money in the hands of the agent is barred, inasmuch as it has not been brought within a reasonable time from the date upon which the alleged fraud was discovered. It is clear that in this case the plaintiff had three years within which he might have examined any accounts delivered to him, or might have compared the collections made from the ryots with the receipts granted to them by the defendant. Not having done so, we think that he has omitted by his own negligence and laches to do what the law enjoined him to do, namely, to satisfy himself within a reasonable time that this money had been collected by the defendant.

The special appeal is dismissed with costs.

The 18th December 1873.

Present:

The Hon'ble J. B. Phear, *Judge.*

Suit for Arrears of Rent—Fair and Equitable Rate—Act VIII. (B.C.) of 1869, s. 5.

Case No. 1600 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 30th April 1873, reversing a decision of the Sudder Moonsiff of that District, dated the 27th April 1872.

Oomanund Roy and another (Plaintiffs), *Appellants,*

versus

Sreekant Chowdhry and others (Defendants), *Respondents.*

Baboo Obhoy Churn Bose for Appellants.

Baboo Doorga Doss Dutt for Respondents.

In a suit to recover arrears of rent from a tenant having a right of occupancy, where the only dispute is as to the rate of rent which the defendant is bound to pay, the rate which the defendant has previously paid should be held to be fair and equitable within the meaning of Act VIII. (B.C.) of 1869, s. 5, unless the contrary is shown.

THIS is a suit brought by the plaintiff against his tenant to recover arrears of rent, and the only question is what is the rate of rent which the defendant is bound to pay. It seems that the defendant is a tenant having a right of occupancy, and therefore according to the provisions of section 5, Act VIII. (B. C.) of 1869, he is bound to pay rent at a fair and equitable rate. If there is any dispute between the defendant and the plaintiff as to what is the fair and equitable rate, then the rate previously paid by the defendant should be held to be fair and equitable, unless the contrary is shown in the present suit. Now it has been proved by the plaintiff in this case to the satisfaction of both the Courts below that the defendant has since 1865 paid the plaintiff rent at the rate of 4 Rs. 7 annas 9 pie on more than one occasion; and consequently unless it be shown to the satisfaction of the Court that this is not a fair and equitable rate to be paid for the land which is the subject of the suit, the plaintiff is entitled to recover rent at that rate. As far as I understand the case which has been put before the Court, the defendant has not adduced any evidence whatever to show this is not a fair and equitable rate of He has produced some evidence to show he paid that rate of rent under a misap hension as to his obligation to do so. said that he paid it, because he though was bound to pay it according to the te of the decree passed against a former te from whom he bought his tenure, and now urged that this decree was really no binding force as against the defend Neither of the Courts below, however, found that that decree was not a really e tive decree; and if it was an effective de binding upon the former tenant, it must binding, so far as it goes, upon the pre defendant who stands in the shoes of former tenant. But the question before Court is not so much whether that de is a binding decree against any one as ther the rate of rent which has been under it is a fair and equitable rate of for this land. It seems to me that, as far I can see, there has been no real contest either of the Courts below upon this point

Again, it has been argued that inasmu as plaintiff was bound by his contract the Government at the time when he t this contract to remit to his ryots a cert portion of their rents, therefore somethi must be remitted at any rate upon this r This is the argument as I understand But in the first place, it is difficult to s how any stipulation between the Gove ment and the plaintiff could be used as e dence between the defendant and the pla iff in the present matter. Even if it be e dence, it cannot affect or bear upon t question what is the fair and equitable r of rent which the defendant ought to p to the plaintiff for this land. It may be th plaintiff when he took the land from th Government, agreed to remit to his ryots certain portion of their rents, but that fa did not, I suppose, oblige him as against th Government to keep the rents of his ry at the same level point during the whol period of their holding. It must be st open to the plaintiff upon good cause to sho that the rate of rent of any particular ry ought to be raised. It appears that against the predecessor of the defendant th plaintiff had succeeded in raising the ren and that the defendant has accordingly pa the increased rent. He must continue t pay that rent until he shows to a Cour competent to determine the matter that th rent is not a fair and equitable rent. Upon the whole, it seems to me that on the findin

the Lower Appellate Court the plaintiff s entitled to a decree for the rent at : rate of Rs. 7 4 annas 9 pie which he imed. Accordingly, the decision of the wer Appellate Court must be varied, and in ace of it a decree must be given for rent at at rate with costs to the special appellant.

The 18th December 1873.

Present:

he Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Res-judicata—Act VIII. of 1859, s. 2.

Case No. 454 of 1873.

pecial Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 15th January 1873, reversing a decision of the Moonsiff of Patna, dated the 6th November 1872.

Raj Doollub Sircar (Defendant), *Appellant,*

versus

Ooma Churn Biswas (Plaintiff), *Respondent.*

Mr. G. H. P. Evans and *Baboo Sreenath Banerjee* for Appellant.

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Respondent.

A suit is not barred by Act VIII. of 1859, s. 2, by reason of a prior suit decided against plaintiff's father while plaintiff was a minor, in which the father was sued in his personal capacity, and in which the plaintiff was not a party either actually or by representation.

Kemp, J.—THE only point for decision in this case is whether the suit of the plaintiff is barred under section 2 of Act VIII. of 1859. The Moonsiff was of opinion that in a former suit instituted by Raj Doollub Sircar against Pran Kristo Biswas and others, the said Pran Kristo Biswas being the father of the plaintiff, the plaintiff, who was undoubtedly a minor at the time, was "substantially" represented by his father, and therefore the subject-matter of this suit is *res adjudicata*. The plaintiff's suit was therefore dismissed.

The Subordinate Judge has taken a different view of the case, and is of opinion that inasmuch as the minor was not a party to the former suit, either in person or by representation, the former suit is no bar to the present suit, and he reversed the decision of the Moonsiff.

We are of opinion that the decision of the Subordinate Judge is correct in law.

Before the provisions of section 2 can be applied in bar of a suit, three things must occur: 1st, the cause of action must be the same, or must be the immediate subject of decision in the case; 2nd, that in the former case the point must have been decided by a Court of competent jurisdiction; and 3rd, that the parties must be the same, either actually or by representation. Now, it is clear in this case that Pran Kristo Biswas was sued in his personal capacity, and that the minor was not, actually or by representation, a party to the former suit.

We concur with the Subordinate Judge in holding that the suit is not barred under section 2, Act VIII. of 1859. The case must, therefore, go back to be tried on the merits as directed by the Subordinate Judge, the special appeal being dismissed with costs.

The 22nd December 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Fraud—Limitation—Act XIV. of 1859, s. 9.

Case No. 257 of 1872.

Regular Appeal from a decision passed by the Judge of Midnapore, dated the 29th August 1872.

Dwarkanath Bhooya and others (Plaintiffs), *Appellants,*

versus

Rajah Ajoodhya Ram Khan and another (Defendants), *Respondents.*

Baboos Kalee Mohun Doss, Romesh Chunder Mitter, and *Bhowanee Churn Dutt* for Appellants.

The Advocate-General and *Messrs. J. T. Woodroffe* and *R. T. Allan,* and *Baboos Bhyrub Chunder Banerjee* and *Ashootosh Dhur* for Respondents.

Where a plaint sufficiently alleged that plaintiffs, being entitled to property, were ousted from its enjoyment under colour of a fictitious revenue sale in pursuance of a fraudulent contract, the fraud having been so contrived as to make plaintiffs believe that they had no right of action at all, it was held that the allegations, if true, showed that the plaintiffs had been kept by fraud from a knowledge of their right of action, and brought the case within Act XIV. of 1859, s. 9.

Markby, J.—THIS was a suit to recover possession of two hoodahs or portions of a pergunnah and the price paid for certain

property taken up by Government for a canal.

The plaint states that four pergunnahs of which the names are given constituted the zemindaree of Rajah Ajeet Singh, deceased; that on the death of the Rajah's two widows, Mohun Lall Khan, the father of the defendant Ajoodhya Ram, was in wrongful possession of the zemindaree, whereupon a kinsman of the Rajah brought a suit against him, when it was found that neither party had any interest in the property, but that the ancestors of the plaintiffs were the heirs. That upon this being discovered, Mohun Lall Khan gave up to the ancestors of the plaintiffs the two hoodahs now sued for; the ancestors of the plaintiffs relinquishing all claims on the rest of the zemindaree.

The plaintiffs say that the two hoodahs were in the possession, first of their ancestors and then of themselves, and that whilst they were so held, the defendant Ajoodhya Ram without their knowledge mortgaged the whole zemindaree, including the two hoodahs (for so we read the plaint) to persons who have been called the Debs. This was in 1843-44. In 1847, the Debs obtained a decree of foreclosure, and sold their decree to one Abbott, who (as the plaint alleges) took possession of the entire zemindaree except the two hoodahs which remained in the possession of the plaintiffs as before. Subsequently (they say) the defendant Ajoodhya Ram brought a suit to set aside the decree for foreclosure, and whilst that suit was pending, Abbott, in order to defeat the claim, fraudulently contrived to get the property sold for arrears of revenue, when it was purchased by McArthur who was a party to the fraud, and who, under colour of that sale, dispossessed the plaintiffs in June 1848. It is then stated that the property subsequently passed into the hands of the defendant Sidhee Nuzzur Ali Khan, and that in the year 1860 the defendant Ajoodhya Ram brought another suit for the recovery of possession of the entire zemindaree by redemption of the mortgage and setting aside this fraudulent sale; and that upon this the plaintiffs became aware of this fraudulent sale.

The plaint then proceeds to state that "although the defendant No. 1 had, in his "examination in the said suit on the 1st "October 1860, admitted the right of your "petitioners, and declared that he had no "intention of injuring it, yet, when the said "case was finally decided by the Hon'ble "High Court on the 4th September 1867 in "his favour, he, in execution of the "decree, entered into a compromise with "defendant No. 2 on the 3rd Septem "1870 in the Hon'ble High Court, "under that compromise took possession of "aforesaid two hoodahs belonging to y "petitioners between the 12th and the "of Assin 1278. The value of 184 beegs "9 cottahs 3 chittacks of land situate in "villages as per schedule given below in "said two hoodahs taken up for the ca "*viz.*, Rs. 922-4-12, was along with "value of other lands held in deposit in "Collector's office, and he, the said defend "No. 1, withdrew the said sum on the 1 "November 1870, 23rd and 30th Janu "and 25th February 1871."

With this plaint the plaintiffs filed solehnama here referred to, the copy certain answers made by the defend vakeel in the former suit, and certain o documents in support of their case.

The plaintiffs further state that their ca of action arose in September 1860, wh they discovered the fraudulent sale.

A very full written statement was pu by the defendant, which it is not necess to advert to at length, as the case has be disposed of upon the allegations contained the plaint.

The District Judge raised 17 issues, which, for the present argument, the follo ing only seem to us to be material:—

(1.) Does the plaint disclose any ca of action entitling the plaintiffs to maint this suit as against defendant No. 1?

(2.) Is the said plaint defective for no compliance with the provisions of section of the Code of Civil Procedure, and can a decree be pronounced herein against defend ant No. 1 jointly with defendant No. 2 and, if not, ought not the said suit to b dismissed?

(5.) Is this suit barred by limitation?

The District Judge did not take any evidence, but dismissed the suit on the ground that the plaint did not disclose any cause of action against the defendants, and that the suit was, on the face of the plaint, barred by limitation. He also dismissed the suit against the defendant Nuzzur Ali Khan on other grounds, and that part of the decree is not appealed against.

The only question, therefore, now to be considered is whether the suit was rightly dismissed on the above grounds as against the defendant Ajoodhya Ram.

The plaint seems to us clearly to state a cause of action, and (as we understand the

gment) the District Judge, though he s with the first issue and the fifth issue rately, and determines both in the re- dent's favour, has substantially dealt with case on one ground only, namely, that on face of the plaint the suit is barred by tation.

The plaintiffs admit in the plaint that they e dispossessed in 1848, and it was therefore essary for them to show how they claimed mption from the operation of the statute limitations which would ordinarily bar r claim. This they did by relying upon ion 9 of Act XIV. of 1859. The section vides that : "If any person entitled to a ght of action shall by means of fraud ve been kept from the knowledge of his wing such right or of the title upon hich it is founded, or if any document ecessary for establishing such right shall ve been fraudulently concealed, the time imited for commencing the action against he person guilty of the fraud or accessary hereto, or against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be reckoned from the time when the fraud first became known to the person injuri- ously affected by it, or when he first had the means of producing or compelling the production of the concealed document."

The District Judge, relying upon a deci- on of Mr. Justice Phear,* held that as e plaint did not state that the knowledge f their right of action was kept back from e plaintiffs by fraud, section 9 did not pply. He also held that the defendant did ot claim the property in dispute through uzzur Ali Khan, and therefore (as we nderstand the judgment) not through a erson guilty of fraud; for which reason lso he considered that section 9 afforded the plaintiffs no exemption.

The allegations in the plaint appear to us sufficiently to state that the plaintiffs being entitled to property, and being in enjoyment thereof, were ousted under colour of a fictitious revenue sale, in pursuance of a fraudulent contract between Abbott and McArthur. It is urged that this was no fraud against the plaintiffs. It seems to us it was a fraud against every person who was directly injured by it. The primary object of the fraud was to defeat the claim of the defendant Ajoodhya Ram; but if the plaintiffs were also ousted by it, it was as much a fraud against them as anybody else.

* 1 Indian Jurist 192.

It is also said (and this is the ground taken by the District Judge) that the plaintiffs were not kept by fraud from a knowledge of their right of action; that they knew of their title, and they knew that they were ousted; and that there was no concealment, because Abbott and McArthur were under no obligation to disclose the wrong which had been done by them. But we do not quite understand this reasoning. McArthur and Abbott had by a fraud ousted the plaintiffs from the possession of their property. The fraud was so contrived as to make the plaintiffs believe that they could have no right of action at all; for the transaction was made to assume the appearance of a revenue sale. The very essence of the fraud was giving to the transaction this appearance, and the concealment of its true nature; and we consider that Abbott and McArthur did, by concealing the true nature of the transaction between them, and by carrying on fictitious proceedings under the revenue law, conceal from the plaintiffs their right of action to recover the property. This is sufficient.

The case before Mr. Justice Phear was wholly different. There was in that case no fraud at all; not even the breach of an obligation which the law would enforce, and therefore section 9 could not apply.

The other question is whether the defendant claims through a person guilty of fraud otherwise than in good faith and for valuable consideration. This question appears to have been decided by the District Judge against the plaintiff upon the allegations contained in the plaint and the documents filed by the plaintiffs. As this is a question which in our opinion ought to be tried upon the evidence, we do not wish to comment at length upon this point of the case. It seems to us sufficient to say this. If the allegations in the plaint are true, the defendant Ajoodhya Ram had never any title, and knew that he never had any title to the property now in dispute. He has the bare possession, which possession he received (if the plaint be true) from a person whom he knew to be holding by fraud. It seems to us, therefore, that independently of any construction that may be put upon the documents filed by the plaintiffs, the plaintiffs' allegations if true bring the case within the 9th section, and that the course taken by the District Judge in dismissing the suit on this ground was premature.

We think it would be better to raise specifically in the issues the questions which arise

under section 9, and upon these, together with the other issues, the case will be remanded for trial. The costs of the Court below and of this appeal will be disposed of by the District Judge when he has finally heard the case.

The 22nd December 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Surrender of Dakhilas—Act VIII. of 1859, s. 132.

Case No. 631 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 22nd December 1872, reversing a decision of the Moonsiff of Nattore, dated the 16th May 1872.

Soondur Monee Debia and others (Plaintiffs), *Appellants,*

versus

Kripa Moyee Debia (Defendant), *Respondent.*

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Appellants.

Baboo Mohinee Mohun Roy for Respondent.

Where dakhilas are ordered to be given up in accordance with Act VIII. of 1859, s. 132, the Court is bound to fix a time within which they should be given up.

Glover, J.—We think the Subordinate Judge's order is wrong. The plaintiff appears to have had a sufficient cause of action in the neglect of the defendant to give up to him the dakhilas which he had received from the superior holder, the putneedar. It may be that no pecuniary loss has resulted to the appellants on this account, but in the first place the contract was that the defendant should take the dakhilas from the putneedar, and make them over then and there to the plaintiffs, and it was only a secondary part of that contract that in case of any loss accruing from the putneedar suing the dur-putneedar for the rent, the defendant was to make good the same with costs and interest. The second portion of the contract was distinct, and it is clear that there was an agreement for giving up the dakhilas quite irrespective of the question of any loss that might accrue by reason of any suit for rent that might be brought by the putneedar.

Now, it is admitted that the defendant has not given up these dakhilas, and that of itself is a sufficient cause of action to the plaintiff.

Then, as to the loss, it is by no means clear that the plaintiffs have not suffered, not in money, at least in inconvenience and risk from the neglect of the defendant to give up the receipts; for instance, if the plaintiffs had been called upon in any suit to prove their title as dur-putneedars, they would have found it extremely difficult to do so without these receipts. The Moonsiff has ordered the defendant to give up the dakhilas, and if she fails to do so, to pay Rs. 130 to the plaintiffs as damages. This appears to be in accordance with section 132 of the Procedure Code, with this exception that the Court was bound to fix a time within which the documents were to be given up.

We restore the judgment of the first Court with costs in all the Courts against the defendant, adding a proviso that the dakhilas are to be given up within one month from the date of this order.

The 22nd December 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act VIII. of 1859, s. 337—Common Defence—Appeal.

Case No. 515 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 12th December 1872, reversing a decision of the Moonsiff of Futtickchurree, dated the 16th September 1872.

Shaikh Mahomed Saefoollah (Plaintiff), *Appellant,*

versus

Shaikh Anwar Ali and others (Defendants), *Respondents.*

Baboo Gopeenath Mookerjee for Appellant.

Mr. J. S. Rochfort for Respondents.

In a suit in which the defence of the two defendants was a common one to the extent of denying that plaintiff had any such mokurruree ryotee title as he alleged, and the first Court's decision went on the ground that plaintiff had a title against both:

Held that Act VIII. of 1859, s. 337, was applicable, and one defendant alone might appeal.

Glover, J.—Two points are raised in this special appeal: 1st, whether the appeal is

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Judge was a proper one, inasmuch as the ndant No. 1, who was the principal person plained against by the plaintiff, did not al; and, 2nd whether the Judge has not mitted an error in law in reversing the ion of the first Court without consider- the question of the plaintiff's right of pancy.

ith regard to the first point, there seems e no reason why the appeal could not be ded on the appeal of the defendant No. 2 e. The case of the defendants was a ral one to this extent that the plaintiff no right whatever to the land, and that d no mokurruree ryotee title such as he ed. The defendant No. 1 claimed the for himself, and stated that he had er to his wife, the defendant No. 2, e the defendant No. 2 stated that she taken a lease from the defendant No. 1. two defendants undoubtedly combined e same defence to the effect that the ntiff had no mokurruree title, and either hese two could have appealed against the onsiff's decision. The decision of the first rt proceeded on a ground common to h. They claimed the land to be theirs, the Moonsiff's decision went on the ground t the plaintiff had a title against both the ndant No. 1 and the defendant No. 2, he gave a decree against both of them. tion 337 will therefore apply to this case, the appeal was properly heard at the ance of the defendant No. 2 alone. The e reported in 2 Weekly Reporter, page does not seem to go contrary to this of the case. It is said there by one of learned Judges who formed the majority e Court that section 337 only applies those cases where the Court below has e a decree against several persons, ther plaintiffs or defendants, upon a find- of law or fact which applies to all the ons alike. It seems to us that it cannot contended that the finding of the Moonsiff not equally against the defendant No. 1 against the defendant No. 2 on the same unds and for the same reasons.

On the second ground of special appeal, think the Subordinate Judge was wrong. has decided the case against the plaintiff, ing the decision of the first Court on the d that the plaintiff had failed to prove nuous possession of the land in dispute a fixed rate. This was not the whole as put forward by the plaintiff in his t; he first declared that he had a urruree title, and also stated that he had ired a title to the land by long possession, undoubtedly meaning to raise an issue as to whether he was not entitled to hold the land on a right of occupancy. The Moonsiff understood it in this way, and fixed an issue on the point which he decided in favour of the plaintiff. The Subordinate Judge has ignored this part of the case altogether, and has treated it as if the plaintiff had elected to stand or fall upon his mokurruree title.

We think the Subordinate Judge ought to take this point in consideration, and before giving a decree, which has the effect of ousting the plaintiff from lands of which he has been in possession, on the defendant's own admission, for more than 10 years, he ought to see whether by reason of his having been in possession of the lands for 12 years prior to suit, the plaintiff has acquired a right of occupancy and a title to retain possession of them as against the zemindar (defendant). The case is remanded for the purpose. Costs to follow the result.

The 28th November 1873.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Admission—Mahomedan Law—Heirship constituted by Acknowledgment—Act XXVII. of 1860.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Mirza Himmut Bahadoor

versus

Sahebzadee Begum and another.

In an application by H, E, and B, for a certificate under Act XXVII. of 1860, on proof of heirship to a deceased Mahomedan lady, it was admitted that H and E were the sons of the deceased, and, as such, claimed her property:

HELD that such an admission did not necessarily imply that H and E were, to all intents and purposes, brothers and heirs to each other; and that to give such an effect to the admission would be to carry the doctrine of heirship constituted by acknowledgment further than is warranted by the principles of the Mahomedan Law.

THIS was a case in which Mirza Himmut Bahadoor was the plaintiff, Sahebzadee

* From the judgment of Kemp and Glover, JJ., in Regular Appeal No. 17 of 1869, decided 13th December 1869—12 W. R. 512.

Begum and Mussamut Bismullah Begum, one being the widow, and the other the illegitimate sister, of Mirza Ekbal Bahadoor, were defendants. The case of the plaintiff was that he was one of the co-heirs of Mirza Ekbal. If this point were decided in his favour, other questions would arise respecting the title of the widow to dower, and the title of the sister to maintain possession of certain property of Ekbal which she was possessed of; but, if the question of heirship be decided against Mirza Himmut, none of these questions arise; and their Lordships are of opinion that the judgment of the High Court is right, which decided this question against him.

In the Court below a question was raised on which a good deal of evidence was given, and which was discussed at great length, whether or not Mirza Himmut and Ekbal were the legitimate sons of their mother Baratee and their father Modenarain Singh; but the Court below, as well as the Court above, have come to the conclusion that there was no marriage between their parents, and it must be taken, and indeed is admitted, that they were illegitimate. The Court below held, however, that, notwithstanding this illegitimacy, and notwithstanding therefore that, by the law of the Shea sect of the Mahomedans (which, by admission of parties, applies to this case), the plaintiff would not be heir of Ekbal, that Ekbal had so acknowledged the plaintiff to be his heir, that the plaintiff acquired that status, and was entitled to succeed to his property as such. The High Court, agreeing with the Court below upon the first question as to the legitimacy, reversed its decision upon the second point, being of opinion that there was no proof of any such acknowledgment on the part of Ekbal; and the sole question before their Lordships now is whether or not there was such an acknowledgment. There is no question that, under the Mahomedan Law, acknowledgments may be made of such a kind as to operate, not merely as admissions, but as actually conferring certain descriptions of status, among others a status of heirship, limited or general, as the case may be, upon the persons acknowledged. With respect to acknowledgments of relationships, their Lordships have been referred to Mr. Baillie's "Digest of Mahomedan Law," Part I., published in 1865, and they find it there thus laid down: "The acknowledgment of "a man is valid in regard to five persons—his "father, mother, child, wife, and mowla, "because, in all these cases, he acknowledges "an obligation, and it is not valid excep "these," and then, further, after giving of those acknowledgments which have stated to be valid, on page 406 th found: "The acknowledgment of a m "not valid with respect to any other per "than those before mentioned, such "brother, or a paternal or a maternal uncl "the like," so that, if this passage stood out further explanation, it would lead to conclusion that, by the Mahomedan Law acknowledgment of one person by anoth his brother, and as such his heir and suc sor, would have no validity. However, passage is further explained thus: "T "it is said that the acknowledgment of a "is not valid with respect to any other "those above mentioned, it is only n "that it is not obligatory on any other e "the acknowledger and the acknowled "but, with regard to such rights as "them, only the acknowledgment is val "that, if one were to acknowledge a br "for instance, having other heirs be "who deny the brothership, and the ack "ledger should die, the brother would "inherit with the other heirs, nor wou "inherit from the acknowledger's fath "he denied the descent, but he would "entitled to maintenance, as against "acknowledger himself, during his The acknowledgment contended for co in this, and this only: It appears that, the death of the mother, a proceeding in Civil Court of Gya was instituted on 20th January 1866, in which it is re that Mirza Himmut Bahadoor, Mirza B Bahadoor, and Mussamut Bismullah Beg sons and daughter of Mussamut Ba Begum, deceased, by their pleaders, pr for a certificate, under the provisions of XXVII. of 1860, on the proof of heir to the said Mussamut Baratee Begum. T coupled with this further fact which ap that these three did, by some means or o obtain possession of some property belon to an elder sister, apparently in the char of her heirs, is relied upon as such an ack ledgment as to constitute the status of brotherhood and heirship on the part of plaintiff to the defendant. Their Lords are of opinion that it would be carrying doctrine of heirship constituted by ack ledgment to an extent to which it has n been carried before, and farther than principles of the Mahomedan Law a acknowledgments warrant, if they wer give such an effect as has been contended to what is but an argumentative or infer

...ssion at best. All that is directly ...tted by the statement in Court (the ...age being that of the pleader of the ...es) is that the plaintiff and the defend... were the sons of Baratee, and, as such, ...ed her property. It is sought to deduce ... this that they must therefore neces... be taken to have declared, not only ... they were sons and heirs of Baratee, ... that they were, to all intents and pur..., brothers and heirs to each other— ... brothers" is the term in the plaint— ... that they were entitled to succeed to ... other's property, not only property ...ed from Baratee, but any property ...h may have been obtained by either of ... from any source whatever. It appears ...eir Lordships that it would be very ...ly stretching the purport of this docu... to give it any such interpretation. It ... not appear to their Lordships by any ...ssary implication that they must have ...ded to constitute each full brother of ... other for all intents and purposes as has ... contended. It may be that they sought ... avail themselves of the Soonee Maho...dan Law, whereby, as it was admitted, ...y would, although illegitimate, be heirs of ...eir mother. If that were so, the settlement ... this document amounts to no admission at ..., but simply to a statement of fact, and to ... inference which the law would derive from ... fact. But, be that as it may, their ...rdships are of opinion that it is by no ...ans shown, and no inference can be fairly ...duced that it was the intention of the ...rties by this document, to constitute each ...other, to the other, so as to make him ... heir to his estate.

This being their Lordships' opinion on the ...estion of fact, it is unnecessary for them ... consider the question whether the widow, ...ho is generally included with the other ...harers in the term "heirs," but is not, like ...harers, entitled, in the absence of "resi...duaries," to a "return," is or is not an heir in ...he sense in which the word is used in the ...passage above cited, and also in the passages ...in the Hedaya to which their Lordships were ...referred in the course of the argument, so ...that her existence would have destroyed the ...effect of the acknowledgment had one been ...proved.

On these grounds their Lordships are of ...opinion that the judgment of the High Court ...is right; and they will humbly advise Her ...Majesty that it be affirmed, and this appeal ...dismissed with costs.

The 16th December 1873.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Collectorate Map—Evidence—Act I. of 1872, s. 2—Increments—Purchaser's Rights.

Case No. 1237 of 1873.

Special Appeals from a decision passed by the Officiating Judge of Dacca, dated the 20th March 1873, modifying a decision of the Subordinate Judge of Furreedpore, dated the 22nd June 1872.

Gunga Narain Chowdhry and another (Plaintiffs), *Appellants,*

versus

Radhika Mohun Roy and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Tarinee Kant Bhuttacharjee* for Appellants.

The Advocate-General and *Mr. C. Jackson* and *Baboos Hem Chunder Banerjee, Chunder Madhub Ghose, Sreenath Banerjee,* and *Lall Mohun Doss* for Respondents.

Case No. 1209 of 1873.

Radhika Mohun Roy and others (Defendants), *Appellants,*

versus

Gunga Narain Chowdhry and another (Plaintiffs), *Respondents.*

Baboos Hem Chunder Banerjee and *Sreenath Banerjee* for Appellants.

No one for Respondents.

Where a Civil Ameen makes a local inquiry as to the situation of certain disputed lands with reference to the Collectorate map put in by the plaintiffs, and not objected to by the defendants, who are present, and recognize the boundary indicated as that whereon the inquiry is to be based, the map must be taken to be one which the parties recognize as correct and trustworthy, irrespective of the question whether it was prepared with the authority of Government.

Where a mehal which has been diminished by diluvion is sold at auction by the Collector who apprizes the public of the existing area, his specification of such area in no way limits the terms of the certificate of sale, or restricts the right of the purchaser from claiming thereafter any accretion to the estate; the increment being always a contingent right which the zemindar has.

Jackson, J.—This was a suit by the plaintiffs to recover possession of a quantity of land which they claimed as belonging to Mehal Chuck Nusseerpore which they purchased at a sale by a Collector in 1866. As regards a portion of the land, they

claimed it as being a part of the area actually in existence at the time when they made the purchase, and the rest they claimed as being lands re-formed on the original site of their mehal, and therefore theirs by the ordinary law of the land. As to the 70 beeghas first described, the Lower Appellate Court found it to have been a part of the plaintiffs' purchased estate, and gave them a decree for it. But, as to the rest of the land, the plaintiffs' suit was dismissed on the ground that, by the terms of the plaintiffs' purchase, they were entitled to 14,000 and odd beeghas of land of which the estate consisted in the year 1866, and to no more. As to the 70 beeghas, the defendants appeal, and they contend that there is no evidence to show that the lands in question were part of the mehal as purchased, and the learned Advocate-General argues that the document upon which the plaintiffs chiefly rely to prove that part of their case being a Collectorate map of 1863, that map, as not coming within the terms, either of section 83 of the Evidence Act, or the corresponding section of Act II. of 1855, which was in force at the time when the suit commenced, is not admissible, and therefore the plaintiffs' suit in that respect falls to the ground. This map, it appears, was put in by the plaintiffs in the Court of first instance, and was amongst the documents forwarded to the Ameen along with the instructions to him to make a local inquiry. What he had to do with that map was to ascertain whether a red line, subsequently drawn upon it just before the purchase by the plaintiffs to represent the amount of diluvion when the purchase was made, did really embrace any portion of the lands claimed by the plaintiffs. The defendants did not then, as they do now, object to the admissibility or correctness of the map. On the contrary, they appear to have been present during the inquiry before the Ameen, and to have recognized this map and the red line upon it as a matter upon which the Ameen was to base his inquiry, and make his report. It seems to us, therefore, that, irrespective of the question whether the map came within the definition of a map prepared with the authority of Government, the objection should fail, and this map, received under the circumstances we have stated and affirmed by the report of the Ameen, must be taken to be a map which the parties recognized as a correct and trustworthy map. That being so, it appears to us that the Court below was justified in finding upon the evidence before it that this land did form a part of the area act sold to the plaintiffs, and that, there the plaintiffs were justly entitled to rec it.

As to the remainder of the area in disp the appeal is on the part of the plain They complain that the Judge has comm an error in restricting them to the are 14,000 and odd beeghas as mentioned in certificate of sale. On the face of certificate, it appears that the Colle certifies one Gopal Kisto Shah of Furr pore to have purchased the whole of zemindaree rights of the Government in mehal mentioned below, and after requi him to observe the rights of the un tenants and other persons declare "উক্ত মহালে গবর্ণমেণ্টের যে জমি সত্বছিল তাহা খরিদারকে বর্ত্তিবে that is to say whatever zemindaree r the Government had in the mehal is ve in the purchaser. Then below comes specification of the mehal. That has th headings,—the first, তফসিল মহাল; second, জমি; and the third, জমা। Under first heading of specification are the wo "২১৪ নং পরগণে জালালপুরের অ পাতি চর নাছিরপুরের মধ্যগত চর লালপুর মুদাফৎ মির আজগরআলি হা that is, Chur Jellalpore Moodafut Meer As Ali included in Chur Nasseerpore, situat within Pergunnah Jellalpore, No. 214. Th under the heading জমি, the quantity giv is 14,496 beeghas 1 cottah 13 chittack and under জমা the sum mentioned Rs. 4,144-2-9, with an addition of Rs. 41 a odd. It appears that, when the map of 18 was made, the mehal No. 214 had an area some 17,000 beeghas, but subsequent me surement shows that by a diluvion that w diminished to 14,496 beeghas, and we appr hend that the Collector, as a public offic and an honest seller, apprized the public that the existing area was only 14,49 beeghas, and therefore the Government would not guarantee the old area of 17,000 beeghas but only that which then existed, and that this specification in no way limited the import which the words of the certificate of sale bore, *viz.*, that the whole of the zemindaree rights which belonged to the Government passed to the purchaser. There are no words which tend in any way to restrict the right of the purchaser from claiming thereafter any accretion. Th

rement is always a contingent right ich the zemindar has. We are referred a case in 19 Weekly Reporter, page 89, gobundhoo Bose, appellant, in which in ase somewhat similar the learned Judges d that "the purchaser of an estate found actual measurement the year before to onsist of a certain number of beeghas ith a specified rental, can have no claim re-formations of land belonging to the ehal as it originally stood." That case ears to us to be distinguishable from the ent. There the purchaser was shown, only to have acquired a smaller area than original area of the estate, but also to e covenanted with Government to pay very greatly reduced sudder jumma. e learned Judges there speak of the dder jumma as a very material item. ey say: "The defendant could have no laim to any re-formations of land belonging to the mehal as it originally stood, inasmuch as he did not buy that mehal, but different one of much smaller area and greatly reduced rent." They say: "In Lopez's case, to which reference was made, the plaintiff continued to pay the original rent for the entire mehal, although a great portion of it had been diluviated, and, when the land re-formed on its original site, he merely recovered what he had been paying rent for all along. Had he received from Government any abatement on account of the diluvion, he would not have recovered the re-formed lands."

It is not shown here, and, notwithstanding at we repeatedly asked the learned Advote-General, he could not point to anything hich would go to show that the present dder jumma is different from that originally ssessed on the mehal. We should prefer o follow the decision in the case in 9 Weekly Reporter, page 312, Mohinee Mohun Doss, appellant, in which Sir Barnes Peacock who delivered the judgment of the Court says: "It is admitted that the plaintiff is entitled to the zemindaree of Kootubpore, and that he is in possession of it, and, in the absence of any evidence to show that the conveyance from the Government to the plaintiff of Kootubpore was so worded as not to pass the increment, or that it expressly reserved increment to the Government, it must be presumed that the person who is now the owner of Kootubpore is entitled to the same interest in the increment which he has in the estate to which it has become annexed. If he has a lawful title to the possession of Kootubpore, he has "*primâ facie* a lawful title to the increment, "and to recover possession of it from the "defendant. It will be a question between "the plaintiff and the Government, in which "the defendant has no interest, whether the "plaintiff is liable to be assessed to the "Government revenue in respect of the "increment."

It was also contended before us that the words of the sale-certificate should be read with, and limited by, the notice of the sale. It turned out, however, on inquiry, that the notice of sale had not been produced by the defendants, and is not on the record. Therefore, even if we were inclined to limit the words in the certificate of sale by those of the notice of sale, we have no means of doing so. For these reasons it appears to us that the decision of the Lower Appellate Court is so far wrong, and that the plaintiffs are entitled, not only to the mehal which they purchased as represented by the area then actually above the water, but also to such other contingent rights as every other zemindar would have.

In this view we think that the decisions of the lower Courts should be varied, and the plaintiffs' suit decreed in full with costs.

The 17th December 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Decree against Joint Property—Legal Inference —Act VIII. of 1859, s. 203.

Case No. 307 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Rungpore, dated the 10th January 1873, reversing a decision of the Moonsiff of Badhekah, dated the 25th April 1871.

Ghotta Shayee (Plaintiff), *Appellant,*

versus

Gour Monee Dossee (Defendant), *Respondent.*

Baboo Bungshee Dhur Sen for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondent.

On the execution of an *ex-parte* decree for money to be paid out of the estate of a deceased party, his son,

who had been arrayed among the defendants, as representing the said estate, instead of objecting under Act VIII. of 1859, s. 203, presented a petition asking for time to pay the amount due under the decree:

HELD that it was right in law to draw the inference that the property was not the self-acquired property of the son, but the joint property of the family.

Glover, J.—I DO not think we should be justified in special appeal in saying that the Subordinate Judge's inference as to the liability of the plaintiff in this suit was an illegal one, or one that the circumstances of the case did not warrant him to draw. The plaintiff, undoubtedly, after the mokurruree jote had been attached in execution of a decree, against his father's estate, put in a petition offering to pay up the amount of the decree and asking for time to allow him to do so. The Subordinate Judge has inferred from this that he admitted the receipt of assets from his father's estate, and that those assets were justly liable for the debts of his father.

As I said before, the proof might be better, still at the same time there does not seem to be anything wrong in law in drawing the inference, for it would have been a very remarkable circumstance for the plaintiff to have acted as he did, if he did not mean to accept the liability to pay off his father's debts, and section 203, Act VIII. of 1859, upon which the plaintiff relies, is not applicable to the present case.

Under these circumstances, I do not think that we should be justified in interfering, and I would dismiss the special appeal with costs.

Kemp, J.—I wish to add a few words to what has fallen from my learned colleague in this case. The plaintiff in his plaint admits that the disputed property was attached and sold in execution of a decree obtained against his father's estate, the said decree being No. 5 of 1869. He also admits that he subsequently presented a petition asking for time to pay off the amount due under that decree, but he states in his plaint that, although he had presented such a petition, being under the impression that he was bound to pay his father's debts, and, in the hope that the decree-holder would come to a compromise, he is by no means bound by the admission contained in that petition.

Now it is clear from the record that there was a decree passed in a money-suit which was decided on the 31st of December 1868. In that suit Chunder Mohun Mundul was plaintiff, and Buddun Chunder Shaha Bungshee Buddun Shaha, the father brother of the present special appellant, defendants, and his widow and the plai were arrayed amongst the defendants representing the estate of Bungshee Bud Shaha. The words used in the original "ও এই বংশীবদন সাহার দ্বিতীয় ও ধনাধিকারি তস্য পুত্র ঘোতত সা that is, the plaintiff in this case. So that very clear from the terms of the decree tha was arrayed as representing the estate of father. The case was decided *ex parte*, the decree was for the amount claimed for costs and vakeel's fees, amounting Rs. 20, to be recovered from Buddun Chun Shaha, and from the widow and the estate the deceased Bungshee Buddun Sh Subsequently, on the execution of this *ex-pa* decree, in which the plaintiff, as alre observed, was arrayed as representing estate of his father, the plaintiff, instead objecting under section 203 of Act VIII 1859, presented a petition to the Co asking for time to pay the amount due un the decree. Section 203 enacts that, "i "decree be against a party as the represen "tive of a deceased person, and such dec "be for money to be paid out of the prope "of the deceased person, it may be execu "by the attachment and sale of any s "property." Therefore, this decree being money to be paid out of the estate of deceased person, it was the duty of plaintiff, if he wished to establish that property which was admittedly attach though unjustly attached as he says, to app to the Court, stating that the prope attached was his self-acquired property, a did not belong to the estate of his father, a he had further to show that he had receive no assets from the estate of his father; b instead of proceeding as the law lays do he petitions the Court for time to pay t decree, and I think, under these circumstanc which I have stated briefly, the Subordin Judge was perfectly right in law in draw the inference that this property was not t self-acquired property of the plaintiff, b was the joint property of the family, and, such, liable to be sold in satisfaction of t decree against the estate of Bungsh Buddun Shaha.

I therefore affirm the decree of the Low Appellate Court, and dismiss the spec appeal with costs payable by the appellant.

b

The 19th December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

...ed of Conveyance—Construction—Conduct of Parties.

Case No. 679 of 1872.

...cial Appeal from a decision passed by ...e Officiating Judge of Tirhoot, dated ...e 30th May 1872, reversing a decision ...f the Subordinate Judge of that District, ...ated the 26th February 1872.

...aikh Lootf Ali (Plaintiff), *Appellant,*

versus

...Budrool Huq and others (Defendants), *Respondents.*

...oonshee Mahomed Yusuf for Appellant.

...e Advocate-General and *Baboo Chunder Madhub Ghose* for Respondents.

..., in order properly to apply and understand the ...isions of a deed, it be necessary to inquire into the ...umstances under which it was executed, a Court ...y rightly make such inquiry.

...he conduct of the parties, after the making of an ...ument, affords a clue to their intentions in regard ...effect only, where they are voluntary actors in the ...eyance, not where it is made against their will by ...ion of a Civil Court.

Phear, J.—In this suit the plaintiff seeks ...recover possession from the defendants of ...share of certain property designated as ...ouzah Birowl, aslee and dakhilee.

There is no dispute between the parties ...to the plaintiff's title to this property, or ...right to recover possession of it, unless ...e defendants obtained a right and title to ...by a conveyance made in the year 1863 at ...auction-sale held in execution of a certain ...ree then subsisting against the plaintiff's ...dor. In short, the principal question in ...s case is whether the defendants obtained ...itle to this property under the sale and ...veyance to them which was alleged to ...e been effected in 1863.

Now it need hardly be remarked that the ...st evidence of what was conveyed to them ...n that occasion is the certificate of sale ...ich was obtained from the Court. And ...e certificate of sale states that the property ...conveyed on that occasion was Mouzah ...ngoon, aslee and dakhilee. So that at first ...ght it would seem that the defendant's ...roof of title entirely fails, and consequently the plaintiff is entitled to a decree in this case.

However, evidence was gone into at the trial to show that the Mouzah Kangoon, aslee and dakhilee, which was sold to the defendants, was understood by the parties to mean, and did in fact mean, something more than Mouzah Kangoon alone; that it included within it Mouzah Birowl, aslee and dakhilee. It perhaps may be doubtful whether, had the plaintiff objected in the first instance, there was sufficient ground in this case for admitting explanatory evidence of this kind. However, the evidence was taken without objection; and we will not say that this case did not fall within the class of cases in which the Court is justified in looking at the circumstances under which the sale was effected, in order to see what was the proper meaning of the document of conveyance.

In the case of Lord Waterpark *vs.* Fennell,* which was decided by the House of Lords in 1859, the Lord Chancellor said, page 1141: "The construction "of a deed is always for the Court, but in order "to apply the provisions (of the deed), "evidence is in every case admissible of all "material facts existing at the time of the "execution of the deed, so as to place the "Court in the situation of the grantor. In "deeds, as well as wills, the state of the "subject at the time of execution may "always be inquired into; and as, with "respect to ancient deeds, the state of the "subject at their date can seldom, if ever, "be proved by direct evidence, modern usage, "and enjoyment for a number of years, is "evidence to raise a presumption that the "same course was adopted from an earlier "period, and so to prove contemporaneous "usage and enjoyment at the date of the "deed."

* The Jurist, N. S., Vol. V., Part I., 1859, p. 1135.

We quote these words, because they show that, in the highest Court of Equity in England, it has been held that a Court may rightly, if it be necessary, in order properly to apply and to understand the provisions of a deed, to inquire, as the Courts below have done in this case, what were the circumstances under which it was executed. And it is not unimportant here that usage, contemporaneous usage, is one of the material facts which, the Lord Chancellor says, may be looked at for this purpose.

The facts which the Lower Appellate Court has considered to be the facts of the case at the time and before the date of this execu-

tion-sale may be very shortly extracted from the judgment of the Lower Appellate Court. The Judge, after stating what he had to see, namely, "whether Mouzah Birowl was a "separate mouzah from Kangoon," says: "There is no doubt that it was once separate "from it." "The Government goozasht "register compiled from those of 1167 to "1198 chiefly shows that, as the plaintiff "states there were then two distinct mou- "zahs, one Kangoon, *aslee maie dakhilee*, "consisting of three mouzahs, and the other "Birowl, *aslee maie dakhilee*, consisting "also of three mouzahs."

The Judge afterwards discussed the evidence which had been given with regard to these two distinct mouzahs, and thus summed up the facts established by it:—

"All this evidence proves beyond doubt "that, as the plaintiff says, the Mouzahs "Birowl and Kangoon were once separate. "But that this was many years ago; and "that, as the defendants say, they afterwards "became merged into one. That, at the "time of the survey, they were one to all "intents and purposes, and were then treated "as one, and that they have continued to be "one ever since, under the merged name of "Kangoon-Birowl, Kangoon being put first "as it was the name of the mehal (see "Government register), though the area of "Birowl was the larger of the two; and "Birowl, the dwelling part of the mouzah, "having become a tolah of Kangoon."

Taking these to be the facts relative to the connection between the two Mouzahs Kangoon and Birowl, it would seem that, even in the view of the Judge, the united mouzahs were known under the designation of Kangoon-Birowl, and not under the name of Kangoon. And therefore, on this state of things alone, the defendant would obtain no title to the double mouzah by a conveyance of a subject designated by the name of the one only. His certificate purports to convey to him Kangoon, aslee and dakhilee. It does not purport to convey to him Kangoon-Birowl, aslee and dakhilee.

The Judge also states what occurred at the time when the sale was effected. He says: "That Kangoon-Birowl belonged "ijmalee to all the defendants; and Mohunt- "pore and Buswarah to Guzuffer Ali, "Khosabbur Ali, Villayat Ali, and Abbas "Ali Khan. And Mohwara belonged to "these first three, &c., &c., (therefore they "said), Let first Kangoon-Birowl be sold; "if the decree be not satisfied from this, "then let other villages be sold.

"On this, on the same day, the Prin "Sudder Ameen gave this order, "'first Kangoon, after that Birowl, after "'Mohuntpore, then Buswarah, &c., &c. "'sold.' Clearly treating Kangoon "Birowl as separate mouzahs. And o "this unfortunate order, all this litig "has arisen. On decreeing this case "the plaintiff, the Subordinate Judge "laid stress on this order as an orde "Court. It appears to me to be simp "mistake of a careless mohurir."

We have no ground for saying that order made in this form was due to the e of a careless mohurir. But, even if it the order remained the order of the Pri pal Sudder Ameen; and we suppose th must have been carried into effect at time of sale. It may have been unin tional on the part of the judgment-cred to procure an order of this kind to be m Still we find that the order was made, still more we find that the certificate of corresponds with it. It seems then that right inference of fact is that the Court in truth for some reason, good or bad, Kangoon only, that is to say, a part of double Mouzah Kangoon-Birowl, and the whole, so that, when the circumstan which attended the sale are closely loo into, they do not appear to be such a give the defendant any right to say that words in his certificate meant more t they naturally mean of themselves.

Finally, the Judge refers to the user of t property which took place after the sa He says: "If there were any truth in t "assertion that the villages were separa "the debtors would have objected to t "creditor's statement that they were on "And then possession by the defendants "Birowl as well as of Kangoon followed th "sale immediately. This is admitted b "Guzuffer in his evidence as well as b "Gholam Abbas. And a year and thre "quarters afterwards, on the 27th Janua "1866, in the petition above mentioned giv "in by Gholam Abbas for Guzuffer an "others, this petition having been dra "out by Guzuffer, &c., it is clearly state "that Birowl was a tolah of Kangoon, an "that 'Mouzah Kangoon, *aslee maie talaj* "'*nilam hua*,' and the owners of Birowl ho "remained without suing for seven years."

Unquestionably, if the conveyance und which the defendant took was a conveyance voluntarily made by the plaintiff's vendo (the judgment-debtor), then the fact, that he stood by for these many years while t

nts were enjoying the property, which d taken as belonging to them under , would be very strong evidence tending to show that he meant, as ndants understood, that the words n, aslee and dakhilee, should carry y Kangoon, but also Birowl. The of the parties to an instrument after ing of it, no doubt, generally fur- a clue which may very rightly be ed trustworthy to their intentions rd to the effect of the instrument ut that is when they are voluntary in the matter of the conveyance. the present case, the sale, although it sale by the judgment-debtor to the nt, was a sale effected by the agency Court entirely against the will of the nt-debtor, and without his concur- It may well enough be that he was misled and was under a misappre- as to what was sold. He would ly be allowed, of course, to say that face of a voluntary deed given by . But the matter is otherwise with to a conveyance which has been against his will without his concur- by coercion of a Civil Court; and we t in such a case the mere standing- several years is not a fact of very mportance for the purpose of ascer- the true scope and meaning of a deed veyance. To hold otherwise would have the effect of applying a law of on to the plaintiff's suit which the of Limitation itself does not contain. nduct of the judgment-debtor in view defendant's taking possession of the ty under the certificate was only an ion, so far as it could reasonably be , of that which the judgment-debtor thought was the force of the convey- It seems to us that he ought not to arred in the present suit from showing e conveyance was not in fact that he at first thought it was.

e weight seems to have been attached Judge to the fact that these two s, Kangoon and Birowl, were at one *hacked* together, and in that manner a a merger of them was effected with- servation of their boundaries upon the map. But this did not prevent the tor of the double mouzah, as we have it before, from selling a part of it, if se to do so. It did not even extin- the separate entity of the two mouzahs. e purposes of convenience, they were y mapped together; but Birowl remained Birowl, and Kangoon remained Kangoon. There was not a conversion, as we understand, of two mouzahs into one under a new distinctive name. Indeed, it is difficult to understand how such a process could have been effected.

The result is that, in our judgment, upon the footing of the facts found by the Lower Appellate Court, the plaintiff is entitled to a decree.

Therefore, we reverse the decision of the Lower Appellate Court, and affirm that of the Moonsiff with costs.

The 22nd December 1873.

Present:

The Hon'ble W. Ainslie and G. G. Morris, *Judges.*

Act VIII. of 1869 (B. C.), s. 27—Limitation—Possessory Suit—Plaint.

Cases Nos. 518 and 519 of 1873.

Special Appeals from a decision passed by the Judge of Sarun, dated the 9th December 1872, affirming a decision of the Moonsiff of Pursa, dated the 26th January 1872.

Surjoo Pershad (Defendant), *Appellant,*

versus

Kashee Rawut and another (Plaintiffs), *Respondents.*

Mr. M. L. Sandel for Appellant.

Baboo Gopal Lall Mitter for Respondents.

The period of limitation prescribed by Act VIII. (B.C.) of 1869 does not apply to all suits under that law which was not intended to cut down the remedy of ryots, farmers, and tenants by reducing the period within which they would be entitled to bring a suit on their title.

A plaintiff, who succeeds in proving the facts stated in his plaint as necessarily implying a right of occupancy, may succeed in a suit for possession, even though he does not prove the title on which he specifically relied.

Ainslie, J.—THIS was a suit to recover possession of a certain property from the defendant on the basis of a lease granted in the year 1234, and which had been continued as a lease from year to year.

The plaintiff alleges that he had been continuously in possession under that lease, until he was recently dispossessed by the defendant.

Both the lower Courts concurred in giving the plaintiff a decree.

The grounds taken in special appeal are two: *First*, that this suit falls under section 27, Act VIII. of 1869 (B.C.); and, *secondly*, that the plaintiff has failed to prove the specific title he sets up.

It was admitted that it had been ruled under Act X. of 1859 that suits brought under clause 6, section 23, were merely to be treated as possessory actions. But Mr. Sandel contended that that was so, because, in those cases, the Collector had only limited jurisdiction, whereas, under the present law, Act VIII. of 1869 (B.C.), the Court being competent to try the whole question, the period of limitation prescribed under section 27 must apply to all suits brought under that Act. The wording of so much of the section 27 as is applicable to this suit is identical with the wording adopted in Act X. of 1859, with this difference that, in Act X, the words are: "All suits to recover the occupancy *or possession*," whereas in Act VIII. of 1869 the words "or possession" are omitted.

At present we will pass over the alteration.

Then, if we take the words as identical in effect, we must take it for granted that, when the Legislature passed Act VIII. of 1869, they had before them the construction that had been judicially put upon clause 6, section 26, Act X. of 1859. Therefore, we must suppose that, when they adopted the same form of words, they intended to convey the same meaning. If it had been intended to cut down the remedy of ryots, farmers, and tenants, by reducing the period within which they would be entitled to bring a suit on their title from twelve years to one year, we should have expected to find this intention carried out by specific words, and not left to be gathered, the form of words remaining the same, merely from a change of forum.

Then, as to the dropping of the words "or possession," we think that, if anything is to be inferred from this, it is rather in favour of the construction that we put upon the words that remain in the present law. The words "occupancy or possession" are either co-extensive, or one of them has more extensive meaning than the other. the meaning of the word possession co-extensive with, or more limited than, of the word occupancy, it may very well that, by dropping those words, the intent is merely to get rid of a redundancy. if the meaning of "possession" is wi than that of "occupancy," the effect of dropping of that word must be to restr and not to extend, the class of cases to wh the limited period of limitation applies.

The same construction of this sec appears to have been arrived at by Justice Phear in the Special Appeal No. 1 of 1873, disposed of on the 18th instant.*

The other point is one which, we think, not very material. Whether the pottah 1234 has been properly proved or not, it quite clear that both the lower Courts co curred in finding that the plaintiff had be in possession as a tenant for considera more than 30 years, and consequently a ri of occupancy had accrued to him. It true that he did not specifically rely on th in the plaint, but he stated the facts, a succeeded in proving the facts from whi the right of occupancy necessarily follo And, unless we construe the plaint in a v narrow and limited manner, we do not thi that we may say that it did not disclose title by long possession as an alternati title, such alternative not being inconsiste with the alleged title under the pott of 1234.

It was said that, had the plaint been mo specific, the defendant might have met th case under the right of occupancy by pro ing specifically matters which would ha negatived it. Only one suggestion w made, namely, that this was a zeraet land but this has been already dealt with, and th lower Court has found that this was no zeraet land.

If it had been shown to us by affida or otherwise that the defendant had bee prejudiced in the trial by his ignorance o the title set up by plaintiff on the footing a right of occupancy, and that there wer other facts which he could have brough forward to defeat this title, we might hav been disposed to remand the case; but a mere suggestion that, by some possibility, there may be some such facts, is not a suffi cient ground for our interference.

Both the appeals are dismissed with costs.

* *Ante*, p. 53.

The 22nd December 1873.

Present :

The Hon'ble W. Ainslie, *Judge.*

by Ryot—Ejectment—Possession—Title.

Case No. 1736 of 1873.

rial Appeal from a decision passed by e Officiating Additional Judge of ssore, dated the 14th May 1873, affirming a decision of the Additional Moonsiff f Khoolna, dated the 1st July 1872.

oon Dutt Bonick (one of the Defendants), *Appellant,*

versus

Ram Nath Kurmokar (Plaintiff), *Respondent.*

boo Grish Chunder Ghose for Appellant.

Baboo Radhika Churn Mitter for Respondent.

When a ryot comes into Court to recover possession der the Rent Law, Act VIII. (B.C.) of 1869, he must ve, not only that his zemindar has dispossessed him, that the action of the zemindar was beyond his l powers.

When a tenant comes into Court suing on his title, fails to establish it, he cannot fall back on mere session.

THE plaintiff in this suit sued his zemindar to recover possession of certain lands on the strength of a pottah of 1238, and continued possession, and the Courts below have concurred in decreeing the plaintiff's claim. The second Court, however, has specifically stated that it only gives plaintiff a decree in the suit as laid, *i. e.*, in a possessory suit under the Rent Act; and that it cannot say what might be the result of a regular suit in which the plaintiff should be put to distinct proof of his title. The first ground taken in special appeal is that the Judge has treated this rather as a suit under section 15, Act XIV. of 1859, than as one under the Rent Law, and that it has been determined by a Full Bench, *vide* page 513, Weekly Reporter, Volume IX., that, when a ryot comes in under the Rent Law, he must prove not only that his zemindar has dispossessed him, but that the action of the zemindar was beyond his legal powers. The words of the present Rent Law and of clause 6, section 23, Act X. of 1859, under which that judgment was given, are identical; and I think that the plaintiff was, as contended, bound to show, and the Court was bound to find, illegal ouster. But there is another objection which goes very much farther, and it is that both the Courts below have found against the plaintiff on the title set up by him. If this is so, I think there can be no doubt that the suit ought to have been dismissed; because, when a tenant comes into Court suing on his title, and fails to establish that title, if he can fall back upon mere possession, and get a decree independently of any right to hold the land, the consequence would be that the landlord, who has just succeeded in defeating the title set up, would have to meet the decree by a fresh suit, notwithstanding that the judgment already arrived at would be conclusive between the parties, so that the second suit must end in a decree reversing the first decree. This is a state of things which clearly ought not to be brought about by the action of the Courts; and, if this is the consequence of a merely possessory order in a suit on title, it shows that the order is a wrong one. I think there can be no doubt that this was a suit in which the plaintiff undertook to set up his title, and, as the Judge has based his decision upon simple proof of possession without reference to title, that decision, as it stands, must be set aside. The Judge has found against the pottah of 1238 propounded by the plaintiff. So far his judgment is conclusive. But, on reading the plaint, it is clear that there is an alternative title set up, and the Judge has found that the "plaintiff has "adduced oral evidence in abundance to prove "that he has, for many years, enjoyed possession by receipt of rent or share of produce." Whether this meant that the years extended far enough back to create the right by occupancy, I am not able to say. This is a matter of fact which the Judge must determine for himself. With these remarks the case must be remanded to the Lower Appellate Court. The costs will follow the result.

The 22nd December 1873.

Present:

The Hon'ble W. Ainslie, *Judge.*

Default—Act VIII. of 1859, ss. 114 & 119.

Case No. 1781 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 19th May 1873, affirming a decision of the Officiating Additional Moonsiff of that District, dated the 11th June 1872.

Uluck Monee Chowdhrain (Plaintiff), *Appellant,*

versus

Panchoo Coomar Chunder Chowdhry and others (Defendants), *Respondents.*

Baboo Anund Chunder Ghosal for Appellant.

Baboo Doorga Mohun Doss for Respondents.

In a case struck off for default, if the order has been properly made under Act VIII. of 1859, s. 114, the remedy is by motion under s. 119; if improperly made, it is open to appeal.

I THINK this special appeal cannot be maintained. The plaintiff brought this suit against four persons. On the day fixed for the settlement of issues, one of them did not attend. The hearing was then adjourned to a further day for the purpose of enabling the plaintiff to give evidence that the summons had been properly served on the absent defendant. On that further date, the plaintiff's pleader, not being prepared with evidence of the service of summons, proposed to strike the name of the absent defendant off the record; but it appears that he neither put in any application in the usual form in writing, nor obtained any order to that effect before leaving the Court, and, at a later period of the day, he was called upon to produce his evidence. He was then not in attendance, and the case was dismissed as for default. The plaintiff now seeks to bring a fresh suit on the same cause of action, and is met by the final clause of section 114 of the Code of Civil Procedure. I think it is quite clear that the suit cannot proceed. If the order made in the former suit was properly made under section 114, the remedy for plaintiff was by motion under section 119. If, on the other hand, that order was improperly made, it should have removed by an appeal; not having appealed against, it has become final. T fore the last words of the section wh have alluded to apply, and this appea be dismissed with costs.

The 22nd December 1873.

Present:

The Hon'ble J. B. Phear and W. Ai *Judges.*

Use of Land—Rent—Limitation—Cus

Case No. 281 of 1873.

Special Appeal from a decision pass the Subordinate Judge of Gya, the 21st November 1872, affirming a sion of the Moonsiff of that Di dated the 1st April 1872.

Mohunt Jumna Doss (Plaintiff), *Appellant,*

versus

Gawsee Meah (Defendant), *Respond*

Mr. M. L. Sandel for Appellant.

Moonshee Abdool Baree for Respond

In a suit to recover money due, or payment in for the use of plaintiff's land by stacking timber on, and keeping it there for a specified time:

HELD that the claim was of the nature of a rent, and governed by the law of limitation app to money-claims of that kind.

Where there are well-known terms upon wh use of land for stacking timber is permitted by its and a party, with the knowledge of this cust practice, uses the land in this way, he is bound, an implied agreement, to pay accordingly for su

Phear, J.—IT appears to us that Lower Appellate Court in this case did very clearly apprehend the nature of plaintiff's claim.

The suit is in substance a suit brough recover money due, or the value of a ce proportion of goods which ought to be in kind, for the use by the defendant of belonging to the plaintiff, in a parti manner, namely, use by stacking tim thereon, and keeping it there for a consi able specified period.

Now the plaintiff's ownership of the l is not disputed; and perhaps I should right in saying that the defendant does deny having stacked timber upon it. states somewhat ambiguously that he did stack and sell the timber. But probabl

h

ld be right for the Court to consider the plaintiff's allegation with regard to mode in which his land had been used occupied was not admitted.

he first thing that we observe is that this n is of the nature of a claim for rent, therefore the law of limitation which lies to a money-claim of that kind ought e applied in this case. If it were applied, eems that at any rate a portion of the ntiff's claim would have to be excluded, the whole of the suit would not be ed. This being so, the case ought to be upon its merits. And the first ques- will be—did the defendant use and upy the plaintiff's land in the manner ged in the plaint? If so, the next tion will be—did he occupy with the mission of the plaintiff? Because it need lly be said that, if he occupies land of plaintiff with the plaintiff's permission, is to be presumed that he impliedly dertakes to pay proper rent or compen- ion for the use.

It may be also that the use of the land s had under circumstances which implied obligation on his part to pay a specified t. Thus, it may be the case that this d is habitually let out, either expressly or citly, to persons who float timber down the er for the purpose of stacking their timber re, and afterwards carrying it in land, or ing it; and that there are recognized l-known terms upon which the use of the d in this way is permitted by the plaintiff. this be so, and the defendant has, with owledge of this custom or practice, used land in this way, he is bound, as by an plied agreement, to pay accordingly for use of it. If, however, although he ed the land, he did so without the permis- n and against the will of the plaintiff, then must either be a trespasser, or he might ve a right of the nature of an easement do that which he has done upon the land. is not quite certain from his written state- nt whether or not he has raised a claim this kind. He says that he has done thing more than what everybody else es who is engaged in taking timber down river. But probably all the merits of e plaintiff's claim will be involved in the issues which I have named, that is, the issues besides the issue of limitation. e first of these issues, to repeat, will be— the defendant use and occupy the plaint- s land in the manner alleged in the plaint? d, if so, did he occupy with the plaintiff's mission? And thirdly, if he did occupy with the plaintiff's permission, what is the reasonable and proper rent that he should pay for the use of it?

We reverse the decision of the Lower Appellate Court, and remand the case to that Court for re-trial upon these issues.

Costs to abide the result.

Ainslie, J.—I concur.

The 22nd December 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Possessory Suit—Alternative Relief—Jurisdiction.

In the Matter of

Special Appeals Nos. 2126 to 2129 of 1873.

The Land Mortgage Bank of India (Credit Foucier Indien), Limited, *Petitioner,*

versus

Neeloo Bhutto and others, *Opposite Party.*

The Advocate-General for Petitioner.

No one for Opposite Party.

Where plaintiffs claimed possession, but, in the event of defendants being found entitled to hold as tenants, asked the Court to ascertain at what rate defendants were entitled to hold, and direct a lease to be executed: HELD that, whether the plaintiffs could obtain the alternative relief prayed for or not, their suit ought not to be dismissed as they might succeed in proving their title to the substantial relief sought.

Markby, J.—THE plaint in this case asks for the recovery of possession of land with wassilat. It also asks in the alternative that, if possession be not given, it may be ascertained at what rate the defendants are entitled to hold; and, if necessary, the defendants be directed to execute a kubooleut on receipt of a pottah, the defendants being ordered to pay arrears of rent; or that such further and other relief be granted to the plaintiffs as the Court may, under the circumstances of the case, consider them entitled to.

We think this plaint sufficiently states a cause of action and the relief sought for. The plaintiffs claim possession, but, in the event of the defendants being found entitled to hold as tenants, they ask that the Court will ascertain at what rate the defendant is entitled to hold and direct a lease to be executed.

Whether the plaintiffs can in any event obtain the alternative relief they ask is another matter. They may, at any rate, succeed

in proving that they are entitled to possession, and therefore their suit ought not to be dismissed.

If it should turn out that the plaintiffs are not entitled to possession, the Court will have to consider whether they are entitled to all or any part of the alternative relief asked for; and if the Moonsiff is right in thinking that the rate must be mentioned at which the kubooleut is to be given, that part of the prayer must be rejected. But that is a question which will be better determined when all the facts have been ascertained.

If the plaint had asked for only such relief as it was clearly out of the power of the Court to grant, the case would have been different; but here it is clearly within the power of the Court to grant the substantial relief prayed for, and we think the suit ought to be tried.

The 22nd December 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Act VI. (B.C.) of 1868—Conservancy Powers—Act XVIII. of 1850—Jurisdiction.

Case No. 1550 of 1872.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 24th June 1872, affirming a decision of the Moonsiff of Cutwa, dated the 9th January 1872.

Baboo Ghunder Narain Singh Roy Bahadoor, Deputy Magistrate and Deputy Collector of Cutwa (one of the Defendants), *Appellant,*

versus

Brojo Bullub Gooie (Plaintiff), *Respondent.*

Baboo Unnoda Pershad Banerjee for Appellant.

Baboos Hem Chunder Banerjee, Umbica Churn Banerjee, and *Sreenath Doss* for Respondent.

Where a Deputy Magistrate, in the exercise of the powers conferred on him by Act VI. (B.C.) of 1868, ordered the removal of certain steps which had been erected on the site of old steps forming the approach to two private houses:

HELD, by Markby, J., whose opinion prevailed (Birch, J., holding *per contra*), that the Deputy Magistrate was neither acting judicially, nor was the act done by him in the discharge of his judicial duties, but as a public officer exercising conservancy powers on behalf of the public; and that therefore he was not entitled to the protection afforded by Act XVIII. of 1850.

Markby, J.—In this case, I regret to that we have not been able to agree in opinion, but it is satisfactory to me my judgment, though it must now preva open to appeal.

In this case, it appears that one B Bullub Gooie, the present respondent, w resident of Cutwa, and that, on the info tion of the head-constable of that t proceedings were taken against him by Deputy Magistrate (who was also Chair of the Town Committee), under clause Schedule K of Act VI. of 1868 of the Be Council. The account of these proceed which has been given does not very cl show what was done. It however app that the respondent was convicted of offence under that clause, and fined Rs. He was also, under the same clause, ord by the Magistrate to remove three step sets of steps forming the approaches to houses, which were his property. T three sets of steps the Deputy Magis had found to have been newly erected.

The respondent removed the steps, subsequently brought a suit in the Court against the Deputy Magistrate, Collector, and the head-constable of town, to have it declared that he had right to ascend to his two houses by th three sets of steps, and for damages.

As regards the Collector, the case was once dismissed, the Moonsiff holding there was no ground whatever for mak him a party.

As regards the merits of the case, Moonsiff found upon the evidence that steps had been recently erected on site of old steps; these steps having, for very long period, been the means of appro to the respondent's houses, which w separated from the road by an open dr This being so, the Moonsiff held that they d not come within clause 1 of Schedule K Act VI. of 1868, putting upon that clause very reasonable construction that it did apply to any part of a building recen pulled down and re-erected on the old si He accordingly declared the right of th respondent to pass and repass to and fro his two houses by the steps in question, an directed the appellants to pay Rs. 3 a damages in their representative capacity officers of the Cutwa Municipality. By th I understand it to be meant that the respon ent was to receive compensation to tha amount out of the Town Fund, but that the defendants were not to be personally liable.

It was, however, objected by the appellat

the Moonsiff had no jurisdiction to try suit. The objection appears to have n then based upon the provisions of ion 92 of Act VI. of 1868. But the onsiff, in my opinion, correctly held that only effect of that section was to bring persons exercising the powers of this as executive officers under the control of Commissioner, and did not in any way t the jurisdiction of the ordinary Civil rt; and considering that section 88 vided for the conditions under which a would lie against the Magistrate, he ght it clear that this suit might be ntained.

The Deputy Magistrate, who is the present ellant, did not appeal against this decision, ar as the merits of the case are concerned. he appealed on the ground that the Civil rt had no jurisdiction to entertain the , relying on the same arguments as were d in the Court below. The District Judge the same view as the Moonsiff, and missed the appeal. Upon the case made ore him, the District Judge could come to other conclusion.

In this Court, to which the Deputy Magistrate has now appealed, it is again contended the appellant that the suit will not lie. e puts his case here on the ground that no it can be maintained against him for an act ne judicially and within his jurisdiction, or h the *bond-fide* belief that he had jurisdiction. This is the only ground of appeal, and is evidently founded on the provisions of ct XVIII. of 1850.

This is a defence which ought to have en distinctly pleaded and raised by the nes, as it depends on certain allegations of ct the truth of which ought to be investiated. The appellant, however, has not ked us to send the case back, but has asked to hold, upon the facts as they appear on e judgments of the Courts below, that the fence is well founded; and no objection our entertaining the appeal upon this round has been taken by the respondent. I herefore proceed to consider the case, as if e Act had been relied on in the Courts elow.

That Act provides that "no Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Civil Court for any act done, or ordered to be done by him, in the discharge of his judicial duty, whether or not within the limits of his jurisdiction. Provided that he, at the time, in good faith, "believed himself to have jurisdiction to do "or order the act complained of."

In considering whether the appellant is protected by this Act, I shall assume that he acted in good faith. Therefore, although the steps are now found not to be such as come within clause 1 of Schedule K, so that the defendant had no jurisdiction to remove them, still he comes within the protection of the Act, if he was acting judicially and in discharge of his judicial duty.

This, therefore, in the view that I take of the matter, is the important question for consideration—was the appellant in this case acting judicially and in discharge of his judicial duty within the meaning of the Act (XVIII. of 1850), when he ordered these steps to be demolished? If he was, he is entitled to the protection given by the Act; otherwise not.

Now, as a general rule, every Magistrate does act judicially in discharge of his judicial duty whenever he performs any of the duties which are imposed upon him by the law. The duties which he usually performs are of such a nature as to render it absolutely necessary for their due performance that he should have that protection. He has generally either to punish an offence or to vindicate the rights of a private individual; and if he were hampered by fear of the consequences which might arise from a mistaken conclusion, he could not have that independence of mind which is essential to the discharge of such functions as these.

This protection is not confined to persons holding and exercising a regular judicial office, but it extends to any persons whose duty it is to adjudicate upon the rights, or punish the misconduct of any given person, whatever form their proceedings may take, or however informal they may be. This has been so held in England (Tozer *vs.* Child, 7 Ellis & Blackburn 377), and I do not see any reason to doubt that the same would be held here.

That it is, however, the judicial character of the Act which alone gives the protection may be seen by comparing the law as applied to persons who act under somewhat similar conditions, but not judicially. Thus it has long been the custom in England, and it is beginning to be the custom here, to confer large powers on individuals, or bodies of individuals, to be used for the public benefit. The persons upon whom these powers are conferred in England are generally called Commissioners, and they are placed in this position. Whilst, on the one hand, they are

liable for any wrongful act committed by them, they are, on the other hand, generally protected from personal annoyance and from personal liability. A public officer (generally their secretary) is made defendant in the suit, and the law allows them to defray the costs and damages in any suit brought against them out of the property entrusted to their care. Without such protection as this no one would act as a Commissioner; whereas a greater immunity than this would be dangerous to the interest of those with whom they come in contact.

The powers and duties contained in Schedule K of Act VI. of 1868 of the Bengal Council are (with the exception of the powers to punish an offence) exactly of this character. They are powers which enable the persons in whom they are vested to protect the health and comfort of the inhabitants of the town to which they are applied. They impose upon those persons important public duties which they are bound to perform, but these duties are not, as it appears to me, judicial. The main consideration is not what are the rights of the parties concerned, but what is necessary for the health, comfort, and convenience of the public. I speak of these powers generally, for I am bound to admit that some are judicial, namely, the powers in certain cases to punish for an offence. And I have felt the force of the argument that, had the Legislature intended some of these duties to be judicial, and some not, the line would have been distinctly drawn. It would, perhaps, have been more convenient if this had been done, but I think we can gather from the Act itself what the intention of the Legislature was. Looking only to this schedule, we find certain powers and duties are confided to the Magistrate, some of which are, undoubtedly, judicial, whether the others are so or not. But this is only a schedule; its place in the Act is in sections 82, 83, and also, by reference, in section 42, with which it must, therefore, be read. We thus find that it is primarily a schedule of "conservancy powers," though some other powers are mixed up in it. And section 42 appears to me to draw the required line. That section provides that "it shall be competent to the "Government to declare that all or any of "the powers and authorities which are "vested in the Magistrate, and the duties "which are imposed upon him by the "sections enumerated in Schedule B to this "Act annexed, or by any of them, shall be "vested and exercised by the Town Committee at a meeting." Amongst the du which are enumerated in Schedule B being capable of being so transferred, clauses 1 to 13 of Schedule K, includ therefore, that which has been exercise this case. But section 42 further pro "that nothing herein contained shall "deemed to confer upon any Town C "mittee any power to impose a fine." appears to me to draw the required The powers to fine for an offence are judi and can be confided to the Magistrate al the other powers being conservancy po are not judicial, and may be confided to Town Committee. Unless the line be drawn, we should be compelled to hold these powers, even when exercised by Town Committee at a meeting, were judi powers; for the same powers which, w exercised by one person, are judicial, hardly be otherwise when exercised another. But to hold that the Town C mittee, when exercising these powers, acting judicially would produce a result wh having regard to the nature of that body, a the ordinary mode of conducting business a meeting, would not, to my mind, be sa factory. It could not have been intended the Legislature that a body of Town Co missioners should meet and dispose of clai to valuable rights of property without a forms of procedure or any appeal.

The office which the appellant holds not alone protect him. The Act of 18 very strictly confines its protection to *perso* acting judicially, and to *acts* done, or order to be done, by them in discharge of th judicial duties. And, although there is, doubt, a *primâ facie* presumption that ju cial officers in discharge of public duties a acting judicially, yet that is not always Orders made by a Magistrate under sectio 518 and 519 of the Code of Criminal Pr cedure, which are of a somewhat simil character, are expressly declared by secti 520 not to be judicial proceedings.

Upon the whole, I have come to the co clusion that in this case the Magistra was neither acting judicially, nor was the done by him in discharge of his judici duties, when he ordered these steps to removed. I think what he then did w done by him as a public officer on behalf the public exercising conservancy power and that therefore Act XVIII. of 1850 do not apply.

I have before pointed out that, by t decree of the Moonsiff, the appellant has n been made personally liable, but only as t

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of the Town Committee. No objection has been raised to this form of the decree by either side, and it seems to me reasonable and proper that it should so stand. I only refer to it as showing that a decree in this case is not open to the objection which would naturally arise against a public officer being made personally liable for an act done by him in good faith, though erroneously.

The defendant No. 3, the head-constable, has not appealed. Whether or no, therefore, the decree could have been maintained as against him has not been considered by me in this case, and nothing is decided upon it. As to the form of the decree it is practically immaterial.

I think the appeal should be dismissed with costs.

Birch, J.—The question we are called upon to determine in this case is whether an action can be brought against a Magistrate for acts done by him in the exercise of the powers conferred on him by Schedule K of Act VI. of 1868 (B. C.) The District Towns Act.

Upon the facts there is no dispute. The Deputy Magistrate in charge of the Sub-division of Cutwa is also Chairman of the Town Committee. Information was given to him by a Municipal constable that one of the residents of the town, by name Brojo Bullub Gooie, had constructed some *pucca* steps over the open drain alongside of the highway. Upon receiving this information, the Deputy Magistrate proceeded to make a judicial inquiry, and the result of that inquiry was that he fined the accused Rs. 20 for obstructing the high road, and ordered the steps to be removed under the powers vested in him by Schedule K. The fine was paid, and the steps were removed.

Brojo Bullub Gooie appealed to the District Judge, who held that no appeal lay to the District Court.

Brojo Bullub then brought the present suit in the Court of the Moonsiff of Cutwa, making the Deputy Magistrate the defendant, claiming a prescriptive right to maintain the steps upon the spot from which they had been removed.

The Collector of the District was also made a defendant, but as the trial proceeded, the case as against him was dropped.

Both the lower Courts have given the plaintiff a decree, have declared his right to have three steps erected over the public drain in front of his house, and have awarded him Rs. 3 as damages with the costs of the suit to be recovered from the Deputy Magistrate and the constable who carried out his orders.

It is a matter of surprise that the Deputy Magistrate should have been advised to make the defence he has, and that it should have been persisted in before the Lower Appellate Court. That defence was nothing more than that section 92 of the Act barred the interference of the Civil Court. The Judge points out the fallacy of such an argument, and, as the case was put before him, it was to be expected that he would dismiss the appeal.

It is not until the case comes before us in special appeal that the real and sole defence to such an action is properly urged, and yet the case appears to be one about which the legal advisers of Government have interested themselves.

That defence is that the Deputy Magistrate was acting judicially and as the law prescribes, and could not therefore be sued.

The District Towns Act confers on the Magistrate alone the power to fine under the conservancy provisions of the Act. In respect of offences punishable under the Act, the Magistrate would have to be guided by the provisions of Act XXV. of 1861 (*vide* sections 21 and 11) in the investigation which must precede the order imposing the fine. The proceedings show that the Deputy Magistrate summoned the person accused of creating an obstruction, heard evidence for and against him, and came to a decision thereon. He dealt with the matter judicially and in good faith, and on general principles is protected from a civil action. The fact that he was also Chairman of the Town Committee in no way affects the case; the powers which he exercised he exercised, as Magistrate; it is nowhere suggested that he acted unfairly or with partiality. There is every reason to suppose that he acted under the conviction that his orders were for the public benefit, and that he was bound to issue them.

In the case of Madhub Chunder Gooho *vs.* Kumla Kant Chuckerbutty* (6. B. L. R. 643), it was held that the order of a Magistrate under Chapter XX. of the old Criminal Procedure Code was conclusive as regards the particular act done by him. The Magistrate had removed a bridge which obstructed a *khal*, and the suit was brought to set aside his order, and to have the plaintiff's right to erect the bridge declared. The suit was dismissed on the ground that a Magistrate's order passed with jurisdiction could

* 15 W. R. (Civil) 293.

not be set aside by a Civil Court, and that no suit would lie for a valid declaration of right against persons who had no interest in the matter.

The Full Bench Ruling in the case of Ujalamayi Dasi *vs.* Chandra Kumar Neogi * (4 B. L. R., F. B., 24) has determined that no suit will lie to set aside an order made by a Magistrate under Chapter XX. of the Criminal Procedure Code, or to restrain him from giving effect to his order. Section 311 was held to bar the jurisdiction of the Civil Court in such a case.

In the Madras High Court, in a case in which a Deputy Magistrate, acting under section 308, Criminal Procedure Code, caused a house to be removed as an obstruction to the high road, and was sued for the value of the house, it was held that, although the removal of the house by the Deputy Magistrate was an act without jurisdiction, the Deputy Magistrate, though acting improperly, had acted judicially in making the order for the removal of the house; that he had acted in good faith, though on a hastily-formed belief, that he had jurisdiction, and was consequently protected by Act XVIII. of 1850. The suit against him was dismissed.

Whether the Magistrate acts under a section of the Criminal Procedure Code, or under a special enactment of the Local Government empowering him to remove obstructions, and imposing a fine for causing them, so long as he acts judicially in a *bond-fide* belief that he has jurisdiction, he and those who execute his orders are protected by Act XVIII. of 1850 from being sued in the Civil Court on account of any such act. The words in the Act "acting judicially" must, in my opinion, be considered to extend to proceedings held by a Magistrate exercising his judgment as to whether a fine should be imposed or not under a local Act by which he is empowered to fine.

Damages are laid in the plaint so as to cover the fine imposed. Under the pretence of an action to establish a right, and damages for its infringement, the suit really seems to be one to recover a fine imposed by the Deputy Magistrate, and get his orders set aside.

In my opinion the action will not lie. The Deputy Magistrate and his subordinate, the Municipal constable, are, I think, protected from such a suit by Act XVIII. of 1850. I would decree the appeal, and dismiss the suit with costs in all the Courts.

The 3rd January 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Possession—Mesne-profits—Limitation—Documents—Evidence of Genuineness.

Case No. — of 1874.

Appeal under section 15 of the Letters Patent against the decision of the Hon'ble Dwarkanath Mitter passed on the 5th July 1873 in Special Appeals Nos. 580 and 581 of 1873, from the decision of the Subordinate Judge of Backergunge, dated the 10th January 1873, reversing a decision of the Moonsiff of that District, dated the 26th February 1872.

Anund Chunder Pooshalee and others (Defendants), *Appellants*,

versus

Mookta Keshee Dabia and another (Plaintiffs), *Respondents*.

Mr. C. Piffard and *Baboo Bykunt Nath Doss* for Appellants.

Baboo Umbika Churn Bose for Respondents.

In a suit for possession of land with mesne-profits where limitation was pleaded, the payment by the defendants of a part of the profits to plaintiff's vendor within twelve years prior to the suit was held to be sufficient to prevent the operation of the law of limitation.

Where a kobala, upwards of thirty years old, was produced from proper custody, and offered in evidence, but rejected by the Lower Appellate Court as not genuine because evidence had not been given that it had remained in the custody of the parties after the death of their father, and because it had not been filed in any public office, and no mention made of the purchase in the mofussil or at the sudder station: *Held* that it was erroneous to require such proof, and to overlook the evidence of possession under the kobala.

The following was the judgment of Mitter, J., which was appealed against:—

In this case the Subordinate Judge has found upon the evidence that the plaintiff's vendors were in receipt of their share of the

* 12 W. R. (F. B.) 18.

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its within twelve years prior to the ution of this suit. It has been con- ed that the Subordinate Judge having d that the plaintiff's vendors did not e anything on account of their share to the year 1262, their title was barred imitation, and no payment made subse- nt to 1262 can revive their right which been already extinguished by efflux of This contention seems to me to have ce. The plaintiff proved the possession his predecessor in title within twelve s, and that is all that he was required to nder the law. In point of fact, there no adverse possession prior to 1262. even if there were, if the defendants equently thought proper to acknowledge ust rights of the plaintiff's vendors, and ed to pay them their share of the profits he estate, that fact alone is, in my ion, sufficient to revive their title. In view I dismiss this special appeal with s.

wish to add that, according to the law of tation as it stood in 1262, receipt of its within twelve years was not abso- ly necessary to save a claim to land from operation of that law.

The judgment of the Appellate Court was delivered as follows by—

Couch, C. J.—In these special appeals ch were heard before Mr. Justice Mitter, objections were taken in the grounds of peal. One is that the Lower Appellate rt had erred in law in holding that the was not barred by the law of limitation. at is taken in the first of the grounds of ial appeal, and is repeated in the third, re it is said that in such a case as where it is neither alleged nor proved the plaintiff or his vendors were in t possession with the petitioners, clause section 1, Act XIV. of 1859, has no lication whatever, and the Lower Appel- Court should, in concurrence with the nsiff, have held the case to be barred. second objection was taken in the 4th und of special appeal, which states that Lower Appellate Court has committed error in law in holding that the appel- 's kobala has not come from proper tody, and that the other reasons given discrediting the same are purely conjec- l and gratuitous, and that the long and terrupted possession of the appellants ld have been of itself held as strong dence of their title.

Mr. Justice Mitter, as we have said, heard the appeal. In his judgment he held that there was no ground for the objection to the decision of the Lower Appellate Court upon the law of limitation. The learned Judge said that the Subordinate Judge has found upon the evidence that the plaintiff's vendors were in receipt of their share of the profits within twelve years prior to the institution of the suit; and further on: "The plaintiff "proved the possession of his predecessor in "title within twelve years, and that is all "that he was required to do under the law. "In point of fact, there was no adverse "possession prior to 1262. But even if "there were, if the defendants subsequently "thought proper to acknowledge the just "rights of the plaintiff's vendors and agreed "to pay them their share of the profits of "the estate, that fact alone is, in my opinion, "sufficient to revive their title." He accordingly dismissed the appeal with costs.

We concur in the view which Mr. Justice Mitter took of that part of the case, that the payment of a part of the profits to the parties was sufficient to prevent the operation of the law of limitation. But the other objection that the Lower Appellate Court had come to a wrong decision in respect of the kobala, is not noticed in the judgment of the learned Judge. It is distinctly taken in the grounds of special appeal. We inquired of the pleader who argued the case before Mr. Justice Mitter whether it had been presented to him, and we were informed that it was. Unfortunately, in consequence of the illness of the learned Judge, we have not been able to speak to him on the subject, and we think that, under the circumstances, we may be satisfied with the statement of the pleader. It is very unlikely that a point of such importance would not have been presented to the learned Judge. The Moonsiff said as to the kobala that he considered it to be proved; that he considered it very probable that Ram Joy would have made provision for the widowed daughter, but not have cared for the two other daughters who had husbands and consequently chances of maintenance, and who were in affluent circumstances, which argues in favour of the deed in question, namely, the kobala. He added, what is very true, that the long and uninterrupted actual possession of the share covered by the kobala "is alone sufficient to dispel every whimsical suspicion." We do not know why he called it whimsical; he may have had some reason for doing so which he has not given.

The Subordinate Judge said as to the kobala that the defendants Nos. 1 to 4 contended that the original proprietor, Ram Joy Pooshalee, sold half of his property to their father Teeluck Chunder Pooshalee, and produced a kobala of 1230; that this kobala is really an old document, but that he had not got any valid proof that the kobala was in the custody of the defendants since the death of their father; and, although it was a document of an old date, it did not appear to have been filed in any public office, nor is there any mention made of the purchase either in the mofussil or at the sudder. And after some further observations he said: "I think this kobala is not a genuine document." He does not appear to have taken any notice of what the Moonsiff had very properly taken notice of—the possession of the defendants. And although the kobala was apparently produced by the defendants, he seems to have considered that it was incumbent upon them to give some evidence of its having remained in their custody after the death of their father. Because that evidence was not given, and because it did not appear to have been filed in any public office, and no mention of the purchase was made in the mofussil or at the sudder, he refused to consider the kobala to be genuine, although it purported to have been made more than thirty years ago, and to be what he called an old document. That is a view of the law which cannot be supported. It was erroneous for him to require such strict proof of the custody as he seems to have considered should be given, and simply because such proof was not given to consider the document not to be genuine. He entirely overlooked the most important evidence, namely, the possession which had been in accordance with the kobala. It is difficult to understand how he could have come to such an opinion, and the judgment of the Moonsiff contrasts very favourably with his judgment.

The case must, therefore, be remanded to the Subordinate Judge for him to determine whether the kobala is a genuine document or not. We should be glad if we were at liberty to decide the question now, but it is a question of fact and ought to be determined by the Lower Appellate Court.

The decree of the Subordinate Judge will be reversed, and the suit be remanded to him to try and determine whether the kobala is genuine. He will be guided in giving his decision by the remarks which we have made. The costs will follow the result.

The 3rd January 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Issues—Special Appeal.

Case No. 540 of 1873.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 13th December 1872, affirming a decision of the Moonsiff of Cutwa, dated the 12th September 1872.

Tara Chand Roy (Plaintiff), *Appellant*

versus

Nobin Chunder Roy and others (Defendants), *Respondents.*

Baboo Umbika Churn Banerjee for Appellant.

Baboo Bama Churn Banerjee for Respondents.

A Judge is not bound to decide a question not raised in the plaint; and when a case comes before the High Court in special appeal, the parties are to be held to the case made in the Courts below.

Couch, C.J.—It was objected in this case that the Judge ought to have found whether the plaintiff was entitled to enhance the rent of the land as orchard land. In the plaint which we have had translated, the plaintiff bases his claim for enhancement of rent upon the ground that the defendants held the land at a lower rate than that obtaining in the neighbourhood and paid by tenants in the village for homestead lands, and that the value of the produce of the garden had increased with reference to the rents paid by tenants of the village in general, and by the inhabitants in the neighbourhood for homestead lands of a similar description.

The claim in the plaint is clearly for enhancement of rent as for homestead lands, and we can understand why it was made in that way. The plaintiff had purchased from Radha Nath Ghose, who had through, as it is said, his gomashta entered into an engagement with the defendants that they should hold the land at a certain rent in the condition in which it had been put, namely, as orchard. And it appears to us that the plaintiff, probably knowing that if he had treated this as orchard land and asked to have the rent enhanced as for such, he would have been met by this engagement, attempt-

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evade the effect of it by treating the
endant's holding as homestead lands.
The case has been treated as he stated it
his plaint, and has been decided against
. No objection apparently can be made
that decision; but it is said that some
estion as to the enhancement of the rent
for orchard lands which was not raised in
plaint ought to have been decided. The
dge was not bound to decide a question
t raised by the plaintiff. The decision was
be upon the case in the plaint, and not
on a different case now put forward, as far
appears, for the first time in special
peal. When a case comes before this
urt in special appeal, the parties are to be
d to the case made in the Courts below,
d not allowed to get rid of a decision in
se Courts by presenting a different case
this Court.
The special appeal must be dismissed with
sts.

The 7th January 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Act VIII. of 1859, s. 246—Right of Action—Limitation.

Case No. 528 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of East Burdwan, dated the 16th December 1872, reversing a decision of the Moonsiff of Jehanabad, dated the 31st August 1872.

Brijo Kishore Nag and others (Plaintiffs), *Appellants,*

versus

Ram Dyal Bhudra and another (Defendants), *Respondents.*

Baboo Ram Churn Bose for Appellants.

Baboos Nil Madhub Bose and *Bhowanee Churn Dutt* for Respondents.

If a person, making a claim under Act VIII. of 1859, s. 246, is in actual possession, the order disallowing his claim is only a declaration that his possession is without title. A suit to establish his right, *i. e.*, for confirmation of his possession, must be brought within one year.

Couch, C.J.—THIS was a suit for confirmation of the plaintiff's title to land which had been attached in execution of a decree. The plaintiff had preferred a claim to the land under section 246 of Act VIII. of 1859 which was disallowed; and the suit was not brought within one year from the date of the order of disallowance.

One of the issues in the suit was "whether this suit is affected by the law of limitation." The Moonsiff decided that it was not, saying "for the plaintiff does not sue to set aside the order passed on the said claim-case; he seeks for confirmation of his own title."

On appeal, the Subordinate Judge said that the plaintiffs sued to establish their right to share in the property, and were allowed 12 years to do so, quoting a decision of this Court in 12 Weekly Reporter 33. But he reversed the Moonsiff's decree in the plaintiff's favour on the facts.

On a special appeal by the plaintiffs, it has been objected by the respondents under section 348 that the issue as to the law of limitation has been wrongly decided.

The case in 12 Weekly Reporter 33 is certainly in the appellants' favour, for the learned Judges state as one of the reasons for their decision, that it was "not a suit to "recover possession, so that the plaintiff "should sue to set aside an order under "section 246, declaring the possession of "another party; but it is a suit for the "declaration of right and confirmation of "possession." With every respect for the learned Judges, I think there is a mistake here. The attachment of immoveable property does not alter the possession. There is only a prohibitory order under section 235. If the person making a claim under section 246 is in actual possession, the order of the Court disallowing his claim is only a declaration that his possession is without title. His actual possession remains, and the suit to establish his right would not be to recover possession, but to establish his title, and as it is generally termed for confirmation of his possession. It would be unreasonable that he should have twelve years to bring a suit to establish his title when he is in possession, and only one year when he is not in possession. It appears to me that the reverse of

this would be reasonable. Whether the suit is to recover possession or to confirm it, the substantial question to be determined is the right, and in either case the suit is to establish the right of the claimant.

This was the opinion of the Full Bench as expressed by the Chief Justice in the 7 Weekly Reporter 257. He says: "If the "Court had summarily decided that the "property was liable to be sold, then it "would be necessary to get rid of that "summary order, and the suit must have "been brought within one year from the "date of that order according to clause 5, "section 1, Act XIV. of 1859, or within "two years from the time of the passing of "Act XIV. of 1859 under section 18 of "that Act." It is said in the judgment in 12 Weekly Reporter 34 that this passage is a mere *obiter*, and merely indicated what the law ought to be. As the opinion of a Full Bench, it is entitled to consideration; and in 5 Weekly Reporter 213, there is an express decision by a Division Court that it is imperative upon a person whose claim under section 246 has been rejected under any circumstances to sue within one year. Also in several cases this appears to be assumed by the Court to be the law. They are Venkatanara *vs.* Akkamma, 3 Madras High Court Reports 139, and the cases in 7 Weekly Reporter, pp. 252 and 441.

In this state of the authorities, I think we are not bound to refer the question for decision by a Full Bench. The words of the rule of July 1867 are: "Whenever one "Division Court shall differ from any other "Division Court on a point of law, the case "shall be referred for decision by a Full "Bench."

If the difference was only between this Division Court and that which decided the case in the 12 Weekly Reporter 33, we might, by the terms of this rule, be bound to refer the question. This depends upon whether the word "shall" is to be considered as imperative, and not merely directory. In the present case, I think it is not imperative, and that we may exercise our discretion. The suit ought, in my opinion, to have been brought within one year from the date of order disallowing the claim, and the appeal must be dismissed with costs.

Glover, J.—I am of the same opinion.

The 8th January 1874.

Present:

The Hon'ble W. Markby and E. G. B
Judges.

Misconception of Evidence—Remand—Err Thakbust Map—Cause of Action.

Case No. 510 of 1873.

Special Appeal from a decision passed the Deputy Commissioner of Manbh dated the 18th September 1872, reve a decision of the Moonsiff of Kug nathpore, dated the 30th September

Ram Bundhoo Chatterjee and others (sou the Defendants), *Appellants,*

versus

Mudhoo Soodun Patea and others (Plaint *Respondents.*

Baboo Opendro Chunder Bose for Appellants.

Baboo Huree Mohun Chuckerbutty for Respondents.

Where the Lower Appellate Court stated that no single witness had alleged possession, and it was fou that two witnesses at least had done so, the misconc tion of evidence was considered a sufficient reason a remand.

A mere error in a thakbust map from which no inj has accrued is no cause of action.

Markby, J.—In this case if the o objection had been that the suit would lie for a declaration of title and confirmat of possession, we should not have entertain it at this stage of the proceedings, it having been taken in the Court below. it appears that there is another objecti taken in special appeal, independently of th to the judgment of the Deputy Commission He states in his judgment that not a sing person has been brought forward who asse that he ever was in possession of the land cultivator, that is, in possession on behalf the defendant; but it is pointed out to that two witnesses at least were examin who distinctly stated that they did hold t land from the defendant, and cultivate Therefore that observation of the Depu Commissioner appears to be founded up misconception of the evidence. The res of that would be that we should remand t case to the Lower Appellate Court for a fre decision.

But then comes the question whether can allow this litigation to proceed furth if in fact the suit is one which would not l For, though we might not choose to interf

re the litigation is at an end, it is a erent thing when we are asked to remand ase for further inquiry. Now we think, ding to the plaint, that the suit is not one ich would lie in the Civil Court. The y complaint is that the thakbust map, ich was made in the year 1860, is erro-us. It is nowhere alleged that any injury s accrued to the plaintiff in consequence of t error, and therefore we think that there o cause of action disclosed by the plaint. it being so, we think we are bound to rtain the objection, and not to allow this ation to proceed further.

Under these circumstances, we set aside decree of the Lower Appellate Court, d dismiss the plaintiff's suit upon the und that the plaint disclosed no cause of on. But, inasmuch as this objection was t taken in the Court below, we make no der as to costs.

The 8th January 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Evidence—Special Appeal.

Case No. 83 of 1873.

ecial Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 25th June 1872, reversing a decision of the Officiating Moonsiff of Fullickcherry, dated the 11th April 1872.

Shaikh Assanoollah (Plaintiff), *Appellant,*

versus

Suffer Ali and others (Defendants), *Respondents.*

Baboo Gopeenath Mookerjee for Appellant.

Baboo Sreenath Banerjee for Respondents.

Where it was found in special appeal that the Lower Appellate Court, after considering the evidence of the witnesses in detail and giving its reasons in detail for rejecting that evidence, had not met the judgment of the first Court in a single point, the decision of the Lower Appellate Court was reversed, and that of the first Court restored.

The term *goonjaish lands* construed.

THE plaintiff in this case sued to recover 1 kanee and 5 gundas of land as belonging to a certain talook held by his father and himself, the total area of the talook, as measured in dagh 3135 of the chitta of the year 1839, together with its *goonjaish*, being 2 kanees 5 gundas.

The defendants averred that the lands in dispute belonged to several daghs, Nos. 3128, 3132, 3134, &c.

The Moonsiff deputed an Ameen to examine the ground, and compare the lands held by the parties, and claimed by them, respectively, with the chittas of 1839. The result of that measurement was that the plaintiff was found to hold 2 gundas and 2 krants less than the survey-papers gave to him, and the defendants, 11 gundas and 2 cowries less; this is, as I understand, exclusive of the land now in dispute. The Moonsiff, on this, came to the conclusion that, of the lands now in dispute, parcels of 2 gundas and 11 gundas, respectively, must belong to the respective estates of the plaintiff and the defendants as formerly measured. This left an excess of 15 gundas 1 cowrie and 2 krants to be dealt with. As to these lands, the Moonsiff says: "The Ameen states that this is the "excess of the dagh No. 3128, but he gives "no reason for his assertion. It is not "supported by anything in the record. On "the other hand, the plaintiff has shown his "long possession in the land by the testi-"mony of his witnesses." He then goes on to find that this must be taken to be the *goonjaish land* of the plaintiff, and gives him a decree for it accordingly.

Both the parties appealed from this decision, and the Subordinate Judge has dismissed the plaintiff's suit *in toto*. The Subordinate Judge, in the second para. of his judgment, says: "The Ameen, on surveying the "*locale*, has distinctly stated 1 kanee 3 cowries "1 krant of land to be in the possession of "the plaintiff. I cannot make out on what "account and under what consideration the "lower Court has awarded a modified decree "to the plaintiff," that is, for the 15 gundas in excess. It does not seem difficult to make out on what ground the Moonsiff did so, and I must say that, if the Moonsiff was right in holding that the plaintiff's witnesses satisfactorily proved his long possession, he could not make any other order than the order that he did make in respect of those 15 gundas of land. Then we must go back to the beginning of the decision of the Subordinate Judge in which it seems to me there is

made no claim under the former clause of section 16. They described themselves as khodkhast ryots, thereby claiming the benefit of the latter part of the section, but that is contradicted by the whole circumstances of the case. In the first place, it seems undoubted that the residence of the defendants is in one pergunnah, and the lands are situated in another. Nextly, they could not be hereditary cultivators, because they held under a lease from Raj Kristo; and, further, the terms of the pottah negative the idea of their being hereditary cultivators, because those terms distinctly specify that the defendants were to collect rent from the ryots. But, in the argument before us, and, perhaps, in some earlier stage of the proceedings, the defendants thought fit to rely upon the other clause of the section by showing that the pottah under which they held was created by the late holder of the under-tenure with the express sanction of the zemindar. Under the strict provisions of section 16, no sanction of the zemindar would avail, unless the right is vested in the holder by the written engagement under which the under-tenure is created, or by the subsequent written authority of the person who created it, or his representatives. A question was raised whether this section in all its strictness ought to be applied to the present case, because the tenure, although subsequent to the permanent settlement, was created before the passing of Act VIII. of 1865 (B. C.). There, perhaps, might be some ground for hesitation if the evidence had been anything like proof of a distinct sanction by the zemindar, and we were told that the zemindar, not merely granted the sanction, but that he joined in the creation of the under-tenure by receiving part of the consideration-money paid for it. But, on examining the evidence, it appears that not only no sanction was given by the zemindar, but that no consideration ever passed. There is no ground, therefore, for the contention that there was any ratification by the zemindar, and, under the circumstances, neither clause of section 16 would protect the defendants. The section, in our opinion, certainly applies, and, inasmuch as the defendants are not protected by either of the provisions of that section, the plaintiffs are entitled to succeed. It was contended that the plaintiffs came into Court on the specific allegation of fraud. No doubt they did so, but failure of proving that allegation would not deprive them of the right which they undoubtedly possessed, and which the issues framed in the Court first instance show that they clearly re upon. For these reasons we think judgment of the Lower Appellate Court m be set aside, and the decision of the Sub dinate Judge restored with costs.

The 19th August 1873.

Present:

The Hon'ble Louis S. Jackson and Dwar nath Mitter, *Judges.*

Possession—Limitation—Presumption.

Case No. 713 of 1873.

Special Appeal from a decision passed the Officiating Judge of Nuddea, da the 9th December 1872, affirming decision of the Subordinate Judge that District, dated the 18th July 187

Tarinee Churn Singh and another (Plaintiffs), *Appellants,*

versus

The Collector of Nuddea, on behalf Government, and others (Defendant *Respondents.*

Baboo Mohinee Mohun Roy for Appellan

Mr. R. T. Allan and *Baboos Unno Pershad Banerjee* and *Bhowanee Chu Dutt* for Respondents.

In a suit to recover possession of a julkur, of whi plaintiffs alleged that they had been in enjoyment do to the year 1860 (1266), when they were ousted by t Government who took possession of it as State pr perty, and retained possession to February 1869, which time the Government withdrew their claim, an relinquished their rights in favour of defendants:

HELD that, if the plaintiffs made out their possessi down to 1263, and specially if the defendants did n

a clear interruption of that possession immediately equent to 1263, the plaintiffs would be entitled to presumption that the possession existing in 1263 continued down to the interruption by the act of the rnment in 1266.

Jackson, J.—THE plaintiffs' allegation in s case was that, down to the year 1860, y had been in the enjoyment of the kur of a certain portion of the Matanga river as appertaining to their zemingee Khalsee Koondoo, and that in that r they were ousted by the action of the vernment, who took possession of this and er julkurs as being the property of the e; that the Government retained possesn of this julkur down to the month of ruary 1869, at which time the Governnt withdrew its claim to the julkur rights. , after certain inquiries, came to the nclusion that the defendants were entitled the julkur, and accordingly relinquished in their favour, and also either gave up promised to give up to them the wassilat ecruing for the period of the Government ssession, the defendants at the same time dertaking to indemnify Government against e claim of other parties.

The two questions raised in the Court of st instance were the right to the julkur d the plea of limitation raised by the fendant. The Subordinate Judge came to e conclusion that the plaintiffs were entitled the julkur, but, for the reasons stated in decision, he held that their suit was bard by the law of limitation.

On appeal to the Zillah Judge, the Judge ld that the decision of the lower Court, the point of limitation, was correct, and at, this being so, the Court ought not to ve gone into the question of title. He erefore confirmed the decision dismissing e plaintiffs' suit.

The plaintiffs appeal to this Court, and ey contend that the question of limitation s been improperly dealt with. One of eir contentions is, that in reality the cause f action on which the plaintiffs are entitled o proceed is the taking possession by the fendants in 1869, when the Government linquished the julkur; but they also firmed that, supposing this not to be so, ey well proved their possession down to e year 1860, and that consequently the it was in no view of the case barred.

We are not prepared at present to say at the plaintiffs are entitled to rely upon y cause of action other than the dispossesn by the Government in 1860; but we are also of opinion that this question has not been adequately disposed of by the Courts below. The case is one in which the plaintiffs are, undoubtedly, entitled to the fullest trial of their allegations.

The Judge intimates a suspicion, or more than a suspicion, that the case may be a hard one, and it is quite clear, we think, that there has been no want of diligence on the plaintiffs' part; for their possession, or their right to possession, having been, in fact, suspended from 1860 to 1869 by the interference of the ruling power, and the possession of the defendants subsequent to such interference dating only from February 1869, and this suit having been commenced in May 1870, we think the plaintiffs have been as diligent as any plaintiff in this country could be expected to be.

The issue of possession in our opinion has been unduly narrowed by the Court of first instance, and apparently also by the Appellate Court, to the question whether the plaintiffs have absolutely proved their possession within twelve years before the suit, that is to say, within the short period that elapsed between 1858 to 1860. Now, it is precisely as to that period, that is to say the Bengali years 1264, 1265, and 1266, for which the plaintiffs' proof is considered to have failed, that the defendants are held not to have proved their possession; and that not only as to those years, but antecedently. The Subordinate Judge does not specifically find, but he appears to accredit the evidence produced by the plaintiffs as to possession down to the year 1263.

Now it appears to us, under the circumstances of this case, that, if the plaintiffs clearly made out their possession down to 1263, and specially, if the defendants did not show a clear interruption of that possession immediately subsequent to 1263, the plaintiffs would be entitled to have it presumed that the possession existing in 1263 had continued down to the period at which a well-marked interruption of possession took place by the act of the Government in 1860, or 1266. Considering the importance to the plaintiffs of a clear decision on this point of possession, we think that we are justified in sending this case back to the Lower Appellate Court in order that a clear finding may be arrived at, as far as the evidence admits, as to possession down to 1263, and as following from that, if the contrary be not shown, a continuance in possession down to the proceedings of Government in 1860. The case will be remanded accordingly.

The 17th November 1873.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Specially registered Bond—Act XX. of 1866—Interest.

Case No. 17 of 1873.

Regular Appeal from a decision passed by the Judge of Backergunge, dated the 7th September 1872.

Adur Monee Debia (Plaintiff), *Appellant,*

versus

Koolo Chunder Chatterjee and others (Defendants), *Respondents.*

Baboo Doorga Mohun Doss for Appellant.

Baboo Nullit Chunder Sen for Respondents.

Where a bond is specially registered under the provisions of Act XX. of 1866, the creditor is entitled, on observing the procedure there prescribed, summarily to have a decree for the amount specified, including interest up to the date of such decree. If the creditor intends to secure interest at the rate stipulated after suit and decree, it is not enough to insert the customary phrase "date of realization" in the instrument, as such phrase must be held controlled by other parts of the agreement as expressed in the bond.

Jackson, J.—We think the decision of the Court below is right. The parties agreed that the money should be secured by a bond specially registered under the provisions of Act XX. of 1866, and evidently they had in contemplation that the whole procedure should apply to this transaction. Under that procedure, the creditor, on presentation of a petition to the Court having jurisdiction, together with a certificate of the special registration, is entitled summarily to have a decree for the amount specified, including interest up to the date of such decree, and thereupon he may proceed at once to enforce his decree, or he may abstain from taking steps immediately to enforce his decree; but in no case can he realize anything beyond the amount specified in the decree. As to what took place in this case in execution that gave the plaintiff no cause of action. Then as to the words "date of realization," upon which the appellant so much relies, they appear to us to be merely a customary phrase inserted in such instruments, and must be held controlled by the other parts of the agreement as expressed in the bond. If the creditor intended to secure to himself payment of interest at the r stipulated after suit and after decree, should have secured himself more expres and resorted to a different form of act We think the suit has been properly missed, and that the appeal must be dismi with costs.

It may be added, as I am reminded Mr. Justice Mitter, that, in any case, claim is not one which this Court should willing to encourage, even if the decision been open to us on the merits. It is a cl for compound interest at a somewhat e bitant rate after the date of decree. Th a matter expressly placed by law within discretion of the Court making the decre

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The 8th January 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Act XXV. of 1861, s. 320—Right of Way—Onus Probandi.

Case No. 1885 of 1873.

Special Appeal from a decision passed the Officiating Additional Judge Jessore, dated the 9th May 1873, affi ing a decision of the Additional Moon of that District, dated the 4th Octo 1871.

Puchai Khan and another (Defendants), *Appellants,*

versus

Abed Sirdar and others (Plaintiffs), *Respondents.*

Mr. H. E. Mendies for Appellants.

Baboo Bungshee Dhur Sen for Respondents.

In a suit for a declaration that defendant had no righ of way over certain land belonging to plaintiff, where it appeared that defendant had obtained an order from the Magistrate under the Criminal Procedure Code (Act XXV. of 1861), s. 320, it was *held* that the onus of proving an easement did not lie with defendant, but that it was for plaintiff to prove that he was entitled to *exclusive* possession.

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The plaintiff in this case seeks for a declaration that the defendant has no right of way over certain lands belonging to him, plaintiff. It appears that the defendant obtained an order from the Magistrate under section 320 of the Code of Criminal Procedure, and the effect of an order under that section is that possession shall not be taken or retained by any party to the exclusion of the public, or of certain specified persons, until the party claiming such possession shall have obtained the decision of a competent Court adjudging him to be entitled to such exclusive possession. The plaintiff in this suit, therefore, had to prove, to the satisfaction of the Court, that he was entitled to *exclusive* possession of the land which was the subject of the order of the Magistrate, and a decision of the Civil Court alone could terminate the operation of that order. The Judge of the Lower Appellate Court is of opinion that the Magistrate's order does not take away from the defendant the onus of proving an easement. In this it appears to me that he is in error. If the defendant had put forward no evidence except the award of the Magistrate, it would still have been necessary for the plaintiff to prove something more than that he was the owner of the land before the order of the Magistrate could be rendered inoperative. The Judge has then gone on to dispose of the evidence produced by the defendant in support of his right to the use of the land, but he does not appear to have at all dealt with the evidence brought forward by the plaintiff. The few words in which he alludes to it cannot, I think, be treated as a finding on the credibility of that evidence. If it were to be so treated, it would have to be taken as a finding against the plaintiff, but I think that the Judge was not expressing an opinion of his own, but merely recording what had been suggested by the defendant as throwing discredit on the evidence given on the other side. Looking at the nature of the case put forward by the plaintiff, and the evidence of the existence of a certain state of facts at a recent time to be derived from the order of the Magistrate, I cannot infer from the expressions used by the Judge that he did examine the statements of the plaintiff's witnesses, and that he did, as the result of such examination, accept them as true in whole or in part and sufficient to support plaintiff's claim.

The case must go down to the Lower Appellate Court for re-consideration. The costs will abide the event.

The 9th January 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Execution in a different District—Jurisdiction—Transfer of Decrees.

Cases Nos. 326 and 333 of 1873.

Miscellaneous Appeals from an order passed by the Judge of Gya, dated the 23rd August 1873.

Ram Chunder (Decree-holder), *Appellant,*

versus

Mohendro Nath Bose (Judgment-debtor), *Respondent.*

Mr. R. T. Allan for Appellant.

Baboos Chunder Madhub Ghose, Nil Madhub Bose, and *Rajendro Nath Bose* for Respondent.

Where a decree is transferred, and the name of the transferee put upon the record by the Court which passed the decree, and the transferee, in the character of decree-holder, takes out a copy-decree and certificate, and presents them to the Court of another district for execution, it is beyond the jurisdiction of the latter Court to entertain any question as to the transferee's right to the execution sought.

A transferee merely occupies the position of the transferror relative to the judgment-debtors, and takes the decree subject to the same rights of set-off as those under which it was held by the transferror.

Phear, J.—These two cases have come up to us so much entangled together that we have had considerable difficulty in satisfying ourselves as to the actual facts of each of them. But now that we have, as we believe, ascertained these facts, the matter of dispute between the parties appears to be a very plain one indeed.

In the suit numbered 20 in the Court below, it appears that, so long ago as the 30th March 1865, one Mussamut Bahuns Kooer obtained a decree in the District Court of the 24-Pergunnahs against one Mohendro Nath for costs, amounting in the whole to Rs. 3,100. This lady sold the benefit of this decree to Ram Chunder (called in the case before us the decree-holder) on the 5th December 1866. He, on the footing of this sale or assignment, applied to the Court which passed the decree, on the 23rd April 1867, to substitute his name as decree-holder for that of the Mussamut; and we find that, on this application, the Court made the order that his name should be substituted according to his petition.

After this Ram Chunder, being the decree-holder on the record, made various applications for execution, more than one at any rate to the knowledge of the judgment-debtor Mohendro Nath. And ultimately he obtained an order from the Court which had passed the decree, namely, the Court of the 24-Pergunnahs, for the transmission of a copy of the decree with a certificate to the Gya Court for the purpose of execution. And, in pursuance of that order, the copy-decree and certificate having been transmitted to the Gya Court, the Gya Court entertained the matter, and passed the decision which is now appealed against.

When Ram Chunder, on the footing of this copy-decree and certificate, made his application for execution to the Gya Court, Mohendro Nath, the judgment-debtor, objected that the Mussamut's sale to him, Ram Chunder, was not a *bonâ-fide* sale, and that therefore he was not entitled to execute the decree. The Judge, after taking evidence and giving consideration to various materials before him, came to the conclusion that this objection was good, and refused to grant process of execution to Ram Chunder.

Now it seems to be plain on the facts which have been stated, and which appear to be entirely beyond dispute, that the Judge had no discretion whatever in the matter of this objection. Ram Chunder had been put upon the record by the Court which passed the decree long before the copy-decree and certificate came to the Gya Court. He, in fact, brought that copy-decree and certificate to the Gya Court in the character of decree-holder. And it was beyond the province of the Gya Court, which was in this matter only asked to execute the decree, to entertain any question as to the right of Ram Chunder so to bring the copy-decree and certificate before it. If there were, for any extraordinary reason, grounds before the Court sufficient to suggest a doubt as to Ram Chunder's right to stand in the position of decree-holder, and to ask for execution of the decree, the proper course which ought to have been taken by the Court was to send back the copy-decree to the Court of the 24-Pergunnahs, with a request that that Court would consider whether the apparent grounds were well founded or not. But nothing has been brought under our notice to lead us to suppose that there was any substantial reason why Ram Chunder should not be put upon the record as the substitute for the original decree-holder. No doubt a Court, which is called upon to exercise the discretion reposed in it by the enactment of section 208 of the Civil Procedure Code, ought to be very careful that, in substituting an alleged transferee for an original decree-holder, it does nothing to prejudice the rights of the other parties to the suit. And it would perhaps not be too much to say that the Court when so called upon ought not to substitute an alleged transferee in the place of the original decree-holder on the record, unless it was satisfied, first, that the substitution was necessary or important in order to secure the rights of that transferee as against the transferor; and next, that this substitution could not reasonably be expected to operate to the prejudice of the judgment-debtors. And in order to be well advised upon these points, the Court always ought to afford all parties, inclusive of the original judgment-creditor, the opportunity of being heard before it makes an order for substitution on the application of an alleged transferee.

But we have no reason to suppose in this case that any of these precautions have been neglected, or any of these considerations lost sight of. The Court of 24-Pergunnahs was the Court which had the jurisdiction to make the order of substitution, and we find a due record of such order in the papers of the case. We do not know that this order was made behind the back of any of the parties concerned, or that there was not sufficient reasons for putting Ram Chunder in the place of the Mussamut. And, at any rate, as has already been said, we are of opinion that the Judge of the Court of Gya had no authority to hear and determine the objection which was made before him by the judgment-debtor to the right of Ram Chunder to have execution of the decree.

Accordingly it seems to us that this order must be reversed.

The case which is numbered 21 in the original Court is somewhat different from that of No. 20.

It appears that Mohendro Nath, the judgment-debtor of the first case, obtained a decree against Mussamut Bahuns Kooer in the Gya Court on the 30th June 1873, for possession of certain land and wassilat and costs, the money so decreed amounting, we are told, to a sum of Rs. 7,000 and odd. On the 16th July 1873, he filed a petition in the Gya Court, asking to obtain possession of the land which had been awarded to him, and also for proceedings to be taken to assess the wassilat.

Again, on the 9th August 1873, he filed another petition, asking that certain propert

eged to be property belonging to Mussa- it Bahuns Kooer should be attached in ler to answer the money-part of his decree. it we are told that the property mentioned this petition does not comprise the decree ich the Mussamut had obtained against ohendro Nath in the Court of the 24-Per- nnahs, and which was the subject-matter the case No. 20. However, a few days erwards, namely, on the 30th August 73, Ram Chunder intervened in this case, d presented a petition, wherein he recited at Mohendro Nath had attached the rights d interests of Bahuns Kooer in the decree, hich we may call the decree of the 24-Per- nnahs, and he made objection that this ecree was not the property of Bahuns ooer, but that, on the contrary, he, the titioner Ram Chunder, was alone entitled it.

As we understand the one judgment of e Judge of Gya which has come up to us, e judgment passed in these two cases, e Judge disallowed the objection of Ram hunder, which was thus set up in this tition. Now, with regard to this, we are a position of some difficulty, because we ave no other evidence of that which Moben- ro Nath had done in reference to this ecree of the Mussamut Bahuns Kooer than e passage to which we have referred in am Chunder's petition. It is apparently oubtful whether Mohendro Nath had ever esented at any time any petition to have is decree attached or dealt with. And we ay observe that, if he did ask to have it ttached, he plainly would not have taken e course which was the right course for im to take with regard to it. He should ave simply applied to have it set off, under ection 209 of the Civil Procedure Code, gainst his own decree. And, if he had one this, we think it right to say that, in ur judgment, as far as we understand the ase, the fact that Ram Chunder's name as standing on the record as decree-holder ubstituted in the place and stead of the Mussamut, would not of itself *alone* affect Mohendro Nath's right to have the decree set off against his own decree. It would be a monstrous thing if a decree-holder, by merely transferring his rights to a third person, could place his judgment-debtor in a worse position than he was, or would have been in the absence of that transfer. The transferee merely occupies the position of the transferror relative to the judgment-debtors, and he takes the decree subject to the same rights of set-off as the tranferror held it. Of course, there may be equities between the parties arising out of their conduct towards one another in this matter of transfer, and afterwards, of which we have no cognizance; and therefore we cannot express a judicial opinion upon the point.

We have, however, said so much, because we think it clear that the desire of Mohendro Nath on the one side to get the benefit of the set-off of his own decree against that of Ram Chunder, and the objection of Ram Chunder on the other side to the effect that Mohendro Nath should not, in any way, avail himself of this decree, is at the bottom really of the very confused contest in these execution-proceedings. When the question as to the right of set-off comes regularly before the Court, it will be time enough to determine whether it exists or not. All that we can determine at present is that the order which was made by the Judge, even in the second case, was not well founded, and that it should be reversed, the two parties being allowed in both the cases to proceed regularly to obtain execution in satisfaction of their decrees.

On the whole, having regard to the way in which these cases have come up before us, and the confusion which seems to have prevailed in the mind of both parties with regard to them, we think that each party should pay his own costs in both appeals.

The 9th January 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Joint Family-property—Minor's Interest—Act XL. of 1858.

Case No. 303 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Bhaugulpore, dated the 4th August 1873.

Sheo Nundun Singh (Petitioner), *Appellant,*

versus

Mussamut Ghunsam Kooeree (Opposite Party), *Respondent.*

Mr. R. T. Allan and *Baboo Boodh Sen Singh* for Appellant.

Mr. C. Gregory and *Baboo Unnoda Pershad Banerjee* for Respondent.

Where the joint property of an undivided joint family governed by the Mitakshara Law is enjoyed in its entirety

by the whole family, and not in shares by the members, one member has not such an interest therein as is capable of being taken charge of and separately managed under the provisions of Act XL. of 1858.

Phear, J.—In this case the Judge of the Court below directed the Collector to take charge of the estate of certain minors under the provisions of Act XL. of 1858. Now, it seems to us upon the best consideration which we have been able to give to the facts and evidence before us that this property of the minors exists in no other shape than that of joint and undivided property of a joint family of which the minors are co-members with the objector, governed by the Mitakshara Law. And we are of opinion that, although in this state of facts, the minors no doubt have an interest in land, because, as members of the joint family, they have a right at any moment to call upon the other members to divide the joint property, and to have their proper share assigned to them, still they have not an estate within the meaning of section 12, Act XL. of 1858. The words of that section are as follow:—

"If the estate of the minor consist, in "whole or in part, of land or any interest in "land, the Court may direct the Collector "to take charge of the estate, and thereupon "the Collector shall appoint a manager of "the property of the minor," &c.

It appears to us that the words of this section mean a subject of property which is capable at the time of the appointment of being taken actual charge of and of being managed. This appears to be the tenor of the whole Act.

Section 3 of the Act says that "every "person who shall claim a right to have "*charge* of the property in trust for a minor "under a will or deed, or by reason of near-"ness of kin, or otherwise, may apply to the "Civil Court for a certificate of administra-"tion . . . . . ."

And in section 7: "If it shall appear that any person claiming a right to have *charge* of the property of a minor is entitled to such right by virtue of a will or deed, and is willing to undertake the trust, the Court shall grant a certificate of administration to such person . . . . . ."

In section 3, no doubt, the certificate is declared to be necessary for the purpose of enabling any one to *institute a suit* connected with the estate of which he claims the charge. But we think that here the estate spoken of is something over which the person desirous of instituting the suit asserts that the mi already has rights of property, in virtue which rights the suit is to be brought. S pose that the only right of property, so speak, which these minors had, was the r to insist upon the specific performance c contract to sell property to their decea father made with him by a stranger, suppose it to be necessary for that purpo institute a suit, the event of such a might be to bring into the hands of minors, or their guardian, actual propert the shape of land, &c. But, before the resulted in this way, it could not be that they had any estate or interest in which was capable of being taken charge by any one, or which indeed actu belonged to them. And similarly we th that one member of an undivided joint fa governed by Mitakshara Law has not s an interest in the property of that j family, enjoyed in the entirety by the wh family, and not in shares by the members, is capable of being taken charge of separately managed. In this view it see to us that the order of the Court belo wrong, and must be reversed.

The proper remedy for those persons seek, who are interested in the welfare of minors, and desire to secure to them the fruition of their rights in the family-prope is to procure for them a present share in t property by applying to the other memb of the family for a division, and if that ap cation fails, to a competent Court for same purpose.

We are told that an application of t kind had already been made by the mot on behalf of the minors to a Civil Co and that it has, for some reason, failed of s cess. It does not necessarily follow, howev that another similar application, if duly ma and properly supported, would not succe Of course rights, which have been alrea adjudicated *inter partes* in any suit on brought, cannot again be re-litigated. But, the minors are still members of an undivid joint family, they must still have the rig to call upon the other members for a par tion of the family-property at any time wh advised to do so.

The appellant must have his costs fro the mother, and not from the minors.

We allow one gold mohur for pleader's fees.

The 9th January 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Obstructions—Procedure—Jurisdiction.

Case No. 505 of 1873.

cial Appeal from a decision passed by he Deputy Commissioner of Goalparah, ated the 2nd December 1872, reversing decision of the Extra Assistant Commissioner with the powers of a Moonsiff f that District, dated the 28th August 872.

o Nath Bhagbutty and another (two of the Defendants), *Appellants,*

versus

Jumboo Nath Chuckerbutty (Plaintiff), *Respondent.*

Baboo Hem Chunder Banerjee for Appellants.

Baboo Huree Mohun Chuckerbutty for Respondent.

The proper procedure for the removal of obstructions public thoroughfares is that prescribed in the Code Criminal Procedure: and the fact that a party sus- ns special damage does not warrant his claiming from Civil Court that remedy which the law says must afforded by the Magistrate.

THE special appellant in this case lies upon the judgments of this Court hich will be found reported at page 162, II. Weekly Reporter, and page 58, XVIII. Weekly Reporter, in which it was laid down stinctly that the proper course of procedure for the removal of obstructions to ublic thoroughfares is that prescribed in he Code of Criminal Procedure. The late earned Chief Justice pointed out why this hould be so. For the respondent it is contended that if the plaintiff can show any pecial damage, he may maintain a suit in the Civil Court for removal of the obstruction. It seems to me that neither of the judgments cited supports any such contention. Those judgments say that if a person does not sustain any special damage, he has no cause of action upon which he can sue in the Civil Court. But it does not follow that because he sustains special damage he can claim from the Civil Court that remedy which the law says must be afforded by the Magistrate after taking proceedings in a particular form. No doubt, he would be entitled to a decree for pecuniary damage, and very possibly that decree would result in the removal of the obstruction; but the present suit is not one in which such a decree can be made. I think, therefore, that the decision of the Lower Appellate Court must be reversed, and that of the first Court dismissing the suit must be restored with costs in all Courts.

The 10th January 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Partition—Evidence—Possession.

Case No. 475 of 1873.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 23rd November 1872, reversing a decision of the Subordinate Judge of that District, dated the 16th July 1872.

Doorga Pershad Singh (one of the Defendants), *Appellant,*

versus

Opendronath Chowdhry (Plaintiff), *Respondent.*

Mr. J. H. A. Branson and *Baboo Kalee Prosunno Dutt* for Appellant.

Mr. L. Davis for Respondent.

A partition of property between members of a family, though evidence that the property is probably theirs, is no evidence against a third party unless it is shown that there has been some possession in accordance with the partition.

Couch, C.J.—THERE are only two grounds which can be presented to us as being grounds of special appeal. One is that the Judge has erroneously stated that the deed of partition, as it was put to us, was not evidence, and he has not given effect to it as any evidence. But what the Judge said is that the plaintiff not being a party to the deed, it cannot affect him or his heirs. That is correct. This partition was between the second and third defendants and other members of their family. Although from their including this property in the deed, it may, as Mr. Branson suggested, be argued that it was probably theirs, or they would not have included it, still it is not evidence of that against the plaintiff, unless it is

shown that there had been some possession in accordance with the partition. The including this property in it may have been an unfounded assertion of title on their part unknown to the persons interested in questioning it. It cannot, we think, be considered as of any value. The Judge is quite correct in saying that it does not affect the plaintiff or his heirs.

The other objection is that the Judge has fallen into an error in his judgment in regard to the *nekasee* papers. It does seem that the Judge had ground for saying in his judgment that sufficient time was not given by the Subordinate Judge for the two witnesses to appear. It is true there is the evidence of Srinath that these papers are signed by Madhub and the other person who were the servants of the plaintiff. That not being contradicted is some evidence that they were. The Judge says there is nothing to show who prepared them, or why they were in the possession of the debtor-defendant. This cannot be considered as strictly correct; because there being evidence of their being written by these persons, it may be inferred that they were the persons who prepared them.

But assuming that these papers were evidence in the suit, we must consider what they were really worth as such. They may have been consistent with the plaintiff's case, for the share being in the names of the second and third defendants, their names may have been allowed to appear in the accounts. The Judge says also that there is nothing to show that they represent a real balancing of accounts. It is possible that he is right in this. It appears to us that giving the utmost effect to these papers that the defendants would be entitled to ask the Court to give to them, there is not sufficient ground for us in special appeal to reverse the decision which the Lower Appellate Court has come to upon the whole of the evidence in the case. It was a question of fact for that Court to determine. Putting it at the highest, there was a conflict between the evidence for the plaintiff and the evidence for the defendants. And we ought not to reverse the decision if it appears to us that these papers, which we must consider as rejected by the Judge, ought not to have varied his decision. That is enacted by the Evidence Act, section 167. On the evidence in this case we may say that these papers ought to have varied his decision. Therefore, we think that the appeal must be dismissed with costs.

The 12th January 1874.

Present:

The Hon'ble J. B. Phear and G. G. Mo
Judges.

Management of Estates by Civil Court.

Case No. 308 of 1873.

Miscellaneous Appeal from an order p
by the Officiating Additional Judge
Tirhoot, dated the 1st September 1873.

Suhuj Narain Sahee (Judgment-debtor)
Appellant,

versus

Ram Pershad Misser (Decree-holder),
Respondent.

Baboo Taruck Nath Palit for Appellan

Baboos Kalee Prosunno Dutt and *Ma*
Lall Mookerjee for Respondent.

Property ought not to be taken under the man
ment of the Court with a view to the application o
profits to the liquidation of a debt, unless there is
sonable probability of the debt being discharged wi
a reasonably short period.

Phear, J.—We do not think that suff
ent has been made out to justify our int
fering with the discretion which the Jud
has exercised in this case. The Judge
the words which he has used probably d
not mean that any legislative enactment pr
vented the property from being held und
the management of the Court for more th
two or three years; and he is no doubt right,
he entertains the opinion that this particula
course ought not to be taken for the purpo
of satisfying a decree unless there is reaso
able probability that satisfaction will be
obtained within the period of some two o
three years. According to the facts state
by the Judge, no reasonable probability doe
exist in this case that the total amount o
the bond-debt could be discharged within
reasonably short period of that kind b
taking the property under the managemen
of the Court, and applying the greater por
tion of its profits to the liquidation of the
debt.

We, therefore, think that this appeal
should be dismissed with costs, one gold
mohur being allowed for pleader's fees.

f

The 12th January 1874.

Present:

Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Decree for Costs—Interest.

Case No. 301 of 1873.

cellaneous Appeal from an order passed y the Officiating Subordinate Judge of 'urneah, dated the 21st June 1873.

ekhraj Roy (Decree-holder), *Appellant,*

versus

Iahtab Chand and others (Judgment-debtors), *Respondents.*

Baboo Grish Chunder Ghose for Appellant.

. C. *Gregory* and *Baboos Ashootosh Dhur* and *Boodh Sen Singh* for Respondents.

Where the Privy Council decreed costs only without ntion of interest, the High Court declined to allow erest in execution.

Phear, J.—We think that no cause has en shown for disturbing the order of the ver Court.

The decree which that Court has to ecute is a decree for costs only without ntion of interest. And if it is said that erest ought nevertheless to be considered having been decreed, we shall have further determine what the amount of interest ght to be. It is impossible for us, sitting re, to come to any very sound conclusion to what rate of interest the Privy Council ght be disposed to place upon the costs in is case.

A decision which is reported in 9 Bengal w Reports, page 22,* has been cited to us an authority on the point. But we serve that in that case the Privy Council d affirmed the decision of the local Court hich in terms gave costs and interest. hen this Court was called upon to interret the decision of the Privy Council so ade, it came to the conclusion that the rivy Council had adopted the decree of the cal Court, and made it the dominant decree regards costs in all the Courts. The ffect of that was that the Privy Council ecree became a decree for costs and interst expressly. Consequently, we think that hat case in no degree touches the question hich is now before us. We dismiss the ppeal with costs.

* 17 W. R. 432.

We think that the purchaser had a right to appear separately from his vendor in this matter, and we ought therefore to give him separate costs.

One gold mohur is allowed for pleader's fees.

The 12th January 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Execution—Obstruction—Limitation.

Case No. 295 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 20th June 1873, reversing an order of the Sudder Moonsiff of that District, dated the 3rd August 1872.

Hunkur Singh and another (Judgment-debtors and Claimants), *Appellants,*

versus

Madho Lall (Decree-holder), *Respondent.*

Baboo Taruck Nath Sen for Appellants.

Baboo Boodh Sen Singh for Respondent.

Proceedings may be taken against a judgment-debtor in the execution of a decree any time within three years from the last application of the kind, even though they are not instituted within 30 days after a wrongful obstruction alleged to have been put by him in the way of the judgment-creditor's obtaining possession.

Phear, J.—It appears to us that there has been some misapprehension in the mind of the appellant, and perhaps even of the Courts below, with regard to this application.

The appellant, we are now told, is one of the judgment-debtors. The judgment-creditor may ask the Court to take action against the judgment-debtor in the matter of the execution of the decree at any time within the period of three years from the last time that he made any application of the kind. He is not limited to a period of 30 days. The 30 days of section 226 are important as being the limit prescribed within which the judgment-creditor may, by virtue of section 228, bring in fact an action of ejectment against a stranger without the expense of instituting a regular suit. It seems to us that these proceedings in the Court below may well enough be carried on against the judgment-debtor, even though they were not instituted within 30 days after the time when the wrongful obstruction was alleged to have

been put by him in the way of the judgment-creditor's obtaining possession.

It is not, therefore, necessary for us to go into the merits of this case, nor even to inquire whether the objection which has been made before us that no appeal lay is good or not.

We dismiss the appeal with costs. One gold mohur is allowed for pleader's fees.

The 12th January 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Execution-sale—Notice.

Case No. 331 of 1873.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Tirhoot, dated the 2nd August 1873.

Mussamut Rewut Koonwar and another (Judgment-debtors), *Appellants,*

versus

Omrao Bahadoor Singh and others (Decree-holders), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellants.

Baboo Romesh Chunder Mitter for Respondents.

An objection to the sufficiency of the notice of execution should be taken at the earliest opportunity; where the judgment-debtor knows of the process of execution, it is too late to raise the objection after the execution-sale has been effected.

Phear, J.—If the first objection made in this case had been made in the proper time, it would have been important enough to deserve very serious consideration. But it is plain that, whether or not the judgment-debtors were served personally with notice antecedent to the issuing of the process of execution, they knew well enough of the process of execution long before the sale took place, and before any of the steps preliminary to the sale were taken. It is much too late for them to wait until after the sale had been effected before they object to the sufficiency of the notice of execution. An objection of that kind should be taken, if at all, at the very earliest opportunity.

And as to the other objections, none of the arguments which have been put before us, or the materials upon which we have been asked to consider them, induce us to think that the Subordinate Judge was in er regard to the conclusions at which he arrived. Accordingly we dismiss appeal with costs.

One gold mohur is allowed for plea fees.

The 13th January 1874.

Present:

The Hon'ble W. Markby and E. G. Bi *Judges.*

"Representative in Interest"—Evidence (I. of 1872), s. 21.

Case No. 652 of 1873.

Special Appeal from a decision passe the Judge of West Burdwan, dated 11th January 1873, reversing a dec of the Moonsiff of Bishenpore, dated 23rd March 1872.

Unnopoorna Dassee (Plaintiff), *Appella*

versus

Nufur Poddar (Defendant), *Respondent*

Baboo Rash Beharee Ghose for Appell

Baboo Ashootosh Dhur for Respondent

The purchaser at a sale in execution of a decree held to be "representative in interest" of the judgment-debtor within the meaning of the Evidence Act (I 1872), s. 21.

Markby, J.—The question placed be us for our consideration in special appe as follows: The plaintiff claims the disp property as purchaser from one Goburdh the defendant claims as purchaser at a sal execution of decree against Shib Prosad, brother of Goburdhun. The plaintiff re in the first Court on a document contain an admission by Shib Prosad made bef either sale that he and Goburdhun were t jointly in possession; and the District Jud seems to have considered that this admis was not evidence. It does not appear Shib Prosad is dead.

We think, however, that the evide was admissible under the provisions of Evidence Act. The only question can whether the defendant is "representative interest" of Shib Prosad within the mean of section 21, and we do not know of construction which could be put upon t somewhat vague expression which wou exclude him.

h

We think, therefore, that the document ould have been taken into consideration for at it is worth, and, as we cannot tell w far it would have influenced the mind of District Judge, we are compelled to set ide the decision of the Lower Appellate urt, and to direct that the appeal be heard. The costs of the remand will abide result.

The 13th January 1874.

Present:

he Hon'ble W. Markby and E. G. Birch, *Judges.*

ttachment—Execution-sale—Auction-purchaser—Decree-holder's Rights.

Case No. 278 of 1873.

iscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 17th May 1873, reversing a decision of the Moonsiff of Jehanabad, dated the 5th April 1873.

Khiroda Moyee Dossee (Decree-holder), *Appellant,*

versus

Golam Somdanee (Judgment-debtor), *Respondent.*

Baboo Bipro Doss Mookerjee for Appellant.

Moonshee Abdool Baree for Respondent.

A decree-holder, after attachment of several properties his judgment-debtor, sold the first of them, and, ding the price sufficient to satisfy the debt, proceeded further. The purchaser failing to pay up, the decree-lder applied that this and other properties of the dgment-debtor should be put up for sale. This appli-tion, though opposed, was granted by the Moonsiff, o also directed the debtor, in the event of the property tching a less price than at the former sale, to realize e difference from the first purchaser:

HELD that, as the defaulting purchaser was not before e Court, the Moonsiff's order as to him was rightly t aside by the Judge in appeal:

HELD that the judgment-creditor was not debarred, consequence of what took place on the former sale, m proceeding upon his decree against any other property of the judgment-debtor than that which was originally sold.

Markby, J.—In this case it appears that the judgment-creditor had obtained a decree for a sum of Rs. 148. Several properties of the judgment-debtor were attached, and the first of them was knocked down to a person who bid for it Rs. 154, and that being sufficient to satisfy the debt, the sale proceeded no further. The purchaser, however, failed to pay the purchase-money within the time prescribed, and consequently that sale was not completed. Subsequently, the decree-holder applied that this and other properties of the judgment-debtor which had been attached should be put up for sale, and in his petition he alleged that the purchaser at the first sale was in fact a mere creature of the judgment-debtor, and that he bid this sum only in order to prevent the sale of the property. The judgment-debtor opposed this application on the ground that only the property which had previously been put up for sale could be re-sold. The Moonsiff ordered the sale to proceed, and also directed that the debtor should proceed against the former purchaser if the property fetched a less price than at the former sale. The Judge set aside that part of the order of the Moonsiff which directed the debtor to realize the difference from the defaulting purchaser, and (the second sale having in the meantime taken place) directed the Moonsiff not to confirm the sale of any property other than the property originally sold.

Now, so far as the judgment of the Judge set aside that part of the Moonsiff's order which relates to the defaulting purchaser, we think he was right, because he is not before the Court, and we have really nothing whatever to do with the defaulting purchaser in this case. The question is entirely between the judgment-debtor and the judgment-creditor, and the point which we have to decide is whether, in consequence of what took place on the former sale, the judgment-creditor is debarred from proceeding upon his decree against any other property of the judgment-debtor than that originally sold. The District Judge says that "the law is explicit that the difference between the first and second sales is leviable from the defaulting purchaser." So far the judgment of the District Judge is correct. Under section 254 of the Civil Procedure Code, it is quite true that the difference between the first and second sales is leviable from the defaulting purchaser; but, as we have already pointed out, this is a matter with

which we have nothing to do in this case. But the District Judge then goes on to say that the "decision in 7 Weekly Reporter 110 lays down that the debtor is entitled to credit for the amount bid at the first sale." It is on that point that the District Judge has mistaken the law. The law itself nowhere says what the District Judge there states, and if that decision is looked at, it lays down nothing of that kind. In that particular case, no doubt, the fact was that the whole amount bid at the first sale was set off against the judgment-debtor, but that was only because the bidder at the first sale was found to have been, in fact, the judgment-creditor himself; and that being the case, he was, under the provisions of section 254, liable to make good the difference between the first and the second sales. Therefore it was almost a matter of course to set off against his judgment-debt the liability which he was under of making good the deficiency. If that decision be looked at, it will be seen that in that very same case the Judges distinctly pointed out that what is to be forfeited under section 254 is not any right which the decree-holder may have under his decree, but only the deposit which has been made by the defaulting purchaser. That clearly shows that the Judges there did not treat the mere default of the purchaser in completing the sale as in any way affecting the right of the decree-holder. It is possible that the District Judge has been misled by a statement of the effect of that decision contained in a work which, although not a work of authority, is yet generally referred to, and is generally correct. The effect of the decision in 7 Weekly Reporter is stated at page 302 of Macpherson's Civil Procedure Code, as the District Judge has here stated it. But, on a closer examination of that case, it really appears that it has no bearing whatever upon this question. The decree-holder here has a decree against the judgment-debtor which is still unsatisfied, and there is nothing in the law, or in that decision, which prevents him from proceeding as far as he likes, until that decree is satisfied, against the property of the judgment-debtor.

The result is that the order of the Judge, in so far as it orders the Moonsiff not to confirm the sale of the properties other than the property originally sold, will be set aside, and the execution-proceedings will be brought to a termination according to law.

The appellant is entitled to the costs of this appeal and of the Lower Appellate Court.

The 13th January 1874.

Present:

The Hon'ble J. B. Phear, *Judge.*

Mortgage-bond—Money-decree—Execut

Case No. 838 of 1873.

Special Appeal from a decision passed the Officiating Additional Judge Tirhoot, dated the 29th January 1 reversing a decision of the Moonsi Tajpore, dated the 9th August 1872.

Soobuns Singh and another (Defendant *Appellants,*

versus

Ishur Dutt Misser (Plaintiff), *Respond*

Moonshee Mahomed Yusuf for Appella

Baboo Mohesh Chunder Chowdhry for Respondent.

In a suit to recover moneys ecured by a mort bond, a decree which simply directs the defend pay the plaintiff so much money cannot rightly be t as a decree for the sale of the mortgaged property where the property has passed out of the hands o defendant by a *bonâ-fide* conveyance for value rec a decree cannot be obtained binding the property out making the new holder a party to the suit, or s ing that he had taken with notice of the claim, and the vendor had bound himself not to alienate.

It appears to me impossible to uphold judgment of the Lower Appellate Court.

The plaintiff obtained in 1864 a bond f the 2nd defendant, by which certain prop was pledged to secure the repayment of money lent. In May 1866, he sued 2nd defendant upon the footing of t bond, and obtained a decree which appe to be a decree for money only. Then tak out execution of this decree as if it wer money-decree, he caused the property wh is the subject of suit to be attached and so and he himself bought it at the sale. going to take possession of the property virtue of the sale thus made to himself, found the defendant No. 1 in possession of larger portion of the property, and he brings the present suit, not only against defendant No. 1, but also against the defe ant No. 2, that is, his judgment-debtor the first suit, in order to obtain possession this property upon the footing of the t

h he obtained by purchase on the 1st
1867. We must therefore in this suit
upon the certificate of sale which he
ined at that sale.
ccording to that certificate, he is only
led to the rights and interests of the
gment-debtor in this property, that is,
rights and interests of the judgment-
tor as they existed at the time of that
. The third issue which was framed in
first Court was: "What was the amount
right and share of the judgment-debtor
the time of the auction-sale, when
intiff became purchaser of the same?"
this seems to be the cardinal issue upon
h the plaintiff's right to succeed in this
turns.
he Lower Appellate Court has apparently
pprehended the case in one or two
ticulars. The defendant No. 1, who is
sting the plaintiff's claim to obtain pos-
ion of this property, himself sets up a
e to the property by virtue of a sale to
self which he says the defendant No. 2
made on the 15th July 1865, that is,
ore the present plaintiff had obtained any
ree at all upon the bond against the
endant No. 2. It is admitted before me
there is no question as to the date of
sale, yet throughout his judgment the
ge of the Lower Appellate Court speaks
he defendant No. 1's document of title
eing dated 24th May 1867. The kobala
is on the record, and bears the date on
face of it; and it seems to be pretty
r that the Judge could hardly have
ked at it; he appears to have been
ent to take the statement of the prin-
l facts from the first part of the Moon-
's judgment, and to have misapprehended
passage of that judgment. The Moon-
says: "This is a suit for adjudication
right, recovery of possession, and registra-
on of name in the Collector's rent-roll in
spect of 2 gundas 3 cowries out of 10
ndas 3 cowries 1 dhan 10 krants of
ouzah Daleya Asadhur, Pergunnah Surea,
y cancelment of a kobala executed by
efendant No. 2 to defendant No. 1, based
a sale-certificate dated the 24th May
867."
The Judge has evidently, as it seems, read
passage as if it said that the conveyance
the defendant No. 2 to defendant No. 1
dated the 24th May 1867. Whereas
fact is, that it states the basis of the
intiff's suit to be the certificate of sale
ch he obtained on the 24th May 1867.
As I have already said, the principal and indeed almost the sole issue which has to be tried in the present suit is the issue whether or not the defendant No. 2 was entitled to the property which the plaintiff is now seeking to recover from defendant No. 1 at the date when he, the plaintiff, purchased at the auction-sale procured by him to be made in execution of his own decree. The Judge has, indeed, given reasons by which he seems to have satisfied himself that the decree of May 1866 was in truth a decree for the sale of the mortgaged property, and not merely a personal decree for the payment of money, and so has avoided the question. And he has referred to the case in 4 Weekly Reporter, page 32, as an authority for this opinion.

In that case, the plaintiff had sought for the realization of a bond by which a sum of money was charged upon the bond which was the subject of suit. And a decree was given in general terms in these words: "Tne plaintiff's claim be decreed." This Court, when called upon to interpret that decree, held that it must be reasonably understood to amount to a decree that the property should be sold for the realization of the debt secured thereunder according to the terms of the plaintiff's claim.

Now, in the present case, there appears to be nothing parallel to this. The plaintiff does not in his plaint ask to have the property sold, or to have the money realized out of the property. He merely asks to recover the money secured by the mortgage-bond. And then, again, the decree is not in the general form, "Let the plaintiff's *claim* be decreed," but it is, as it ought to be, specific, and simply directs the defendant to pay the plaintiff so much money. It seems to me that the decree in this form, and of this specific character, cannot rightly be treated as a decree for the sale of the property. And even taking it to be such a decree, if the property had already passed out of the hands of the judgment-debtor by a *bond-fide* act of conveyance for value, as is alleged by the defendant was the case here, then the plaintiff could not obtain a valid decree binding that property without making the new holder a party to the suit; unless he at the same time show that that purchaser took the property with actual notice of the plaintiff's claim upon it, and of the fact, if it be so, that the vendor had bound himself not to alienate to any one. If anything of that kind appeared, and was made out to the satisfaction of the Court, then doubtless the plaintiff might, in the case supposed, be heard to say that he had done

all he needed to do when he made his judgment-debtor defendant.

But this case is altogether different. The decree of May 1866, as I understand it, is not a decree against the property at all; and the certificate of May 1867 only purports to pass to the plaintiff the right, title, and interest of the defendant No. 2 as it existed at the time when the certificate was given. The extent of that interest depends entirely upon the validity of the kobala which the defendant No. 1 sets up as the conveyance of this property from the defendant No. 2 to him in July 1865. If that was not a real conveyance in this sense that nothing passed or was intended to pass from defendant No. 2 to defendant No. 1, then the whole of the property, notwithstanding this transaction, remained the property of the defendant No. 2 in April 1867 just as it was before, and therefore the present plaintiff then obtained it from him by force of his certificate of sale. If, however, that was a good and valid conveyance as between the defendant No. 2 and the defendant No. 1, then the defendant No 2 in April 1867 had no longer any greater right or interest in the property than the one-anna share in respect of which alone the Moonsiff thought the plaintiff was entitled to a decree; and this limited decree, it should be remarked, ought not to have been directed to defendant No. 1; and against the defendant No. 2 the plaintiff had no right to proceed by original suit, because he was able, as against him, to obtain possession of the property in the execution-proceedings of the first suit. The Judge has, no doubt, expressed the opinion that it is impossible to consider the kobala of the defendant No. 1 genuine; but he goes on to give his reasons for this opinion; and they certainly appear to me, with great deference for his opinion, to have no real force. And therefore I must treat this matter as really not having been dealt with by the Lower Appellate Court. Accordingly, I am of opinion that the decision of the Lower Appellate Court must be reversed, and the case sent back to that Court for trial of the third issue framed in the first Court. And in the trial of that issue, the principal matter to be considered will be whether or not the kobala set up by the defendant No. 1 was, in fact, a *bonâ-fide* transaction between him and the defendant No. 2, and had the effect at the time when it was made of passing to defendant No. 1 the interests of the defendant No. 2 to the extent expressed in the kobala.

Costs of this appeal must abide the event.

The 13th January 1874.

Present:

The Hon'ble J. B. Phear, *Judge.*

Partition—Inconvenience—Rights of Way.

Case No. 578 of 1873.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Sarun, dated the 14th December 1872, affirming the decision of the Sudder Moonsiff of that District, dated the 12th June 1871.

Ram Pershad Narain Tewaree (Plaintiff), *Appellant,*

versus

The Court of Wards on behalf of Nurendra Pershad Tewaree and others (Defendants), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Baboos Unnoda Pershad Banerjee, Debendro Narain Bose, and *Aubinash Chunder Banerjee* for Respondents.

Where one of several joint owners desires to have a division of a compound hitherto held in common, mere inconvenience to the others is not a sufficient obstacle to such division.

The fact of the public or other persons having acquired rights of way over the property sought to be divided is not a reason in law against such division, as those rights remain notwithstanding the division.

In this case the defendant admits that the property which is the subject of the suit is ijmalee property, and that the plaintiff has a share in it, although he says that that share is not so large as the plaintiff himself asserts it to be.

If the plaintiff has a share in the property, then he is entitled in this suit to have that share declared, and a partition according to the declaration effected.

The reasons given by the Lower Appellate Court for not allowing the plaintiff to have a partition are not valid in law. It may be inconvenient, no doubt, to the other joint owners to have the compound, which was hitherto used jointly or held in common by them all, divided; but mere inconvenience is not of itself a sufficient obstacle to prevent the plaintiff from having a division to the extent of his share, if he chooses to require it.

Again, the reason given by the Moonsiff for refusing the plaintiff's suit is not well founded in law. If the public, or persons other than the plaintiff and his co-sharers

e acquired rights of way over the pro-
ty which is sought to be divided, those
its will remain notwithstanding the
sion of the land between the sharers.
mere existence of those rights does not
titute a reason why the plaintiff should
have a division.
he decree of the Lower Appellate Court
therefore be reversed, and the case sent
to be determined upon its merits.
he plaintiff must have his costs of this
eal.

The 13th January 1874.

Present:

The Hon'ble J. B. Phear, *Judge.*

Tenancy—Right to Rent.

Case No. 970 of 1873.

cial Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 30th January 1873, reversing decision of the Moonsiff of Monghyr, dated the 29th June 1872.

Bhyro Singh (Defendant), *Appellant,*

versus

Rajah Leelanund Singh Bahadoor (Plaintiff), *Respondent.*

Baboo Boodh Sen Singh for Appellant.

onshee Mahomed Yusuf for Respondent.

party who has been in possession by receiving from occupant ryot the entire rent payable in respect of land, or by virtue of any acknowledgment from that he was occupying the land as the said party's ant at a definite rent, has a right to claim rent from ryot as his personal tenant apart from any title to property.

I THINK this case must go back to the dge for reconsideration.

The matter of suit between the parties by no means complicated. The plaintiff es to recover from the first named defendant e sum of Rs. 11 $15\frac{3}{4}$ as arrears of rent d interest thereon for the years 1277, 1278, d 1279, in respect of certain land of which says he is entitled to 16 annas, that the entirety.

Certain other persons claiming to be o-shareholders, or adverse owners of the roperty, have been made defendants by the ourt, and are called intervenors.

Now, the claim of the plaintiff to recover rent from the ryot whom he sues, must stand pon one or other of the two grounds, namely, either the ryot by payment of rent on previous occasions or otherwise has admitted himself to be bound to pay rent to the plaintiff personally; or the plaintiff must show that he has come by purchase or some sufficient mode of transfer into the place of those persons who had previously the right to receive, and be paid the rent by the defendant ryot.

According to the judgment of the Lower Appellate Court, the plaintiff has failed to establish the second of these two grounds, because the Judge expressly says that the plaintiff has purchased the rights and interests of the previous proprietors, all except one, namely, Juddoo Singh. Consequently, Juddoo Singh being excepted, the plaintiff is not in the position of those who were before his purchase entitled to claim the 16 annas rent which he now seeks to recover from the ryot-defendant, and he does not profess to make out that he represents any one entitled to collect separately any fraction of that entire rent. If then he is not entitled to recover rent upon that ground, is he entitled to recover rent which he seeks upon the first ground? With regard to that, the Judge, after mentioning certain previous litigations, says: "These cases all show that the plaintiff was in *possession* of this whole 16 annas from the time of his purchase." I am disposed to think that the word *possession* has been here used somewhat unadvisedly. It is a word which bears very different meanings under different states of facts. The question which the Judge had to direct his attention to and to determine, was whether the plaintiff had, in fact, been in possession of the land occupied by the defendant-ryot by having received from him the entire rent payable by him in respect of this land or any portion of it, or by virtue of any acknowledgment from him that he was occupying the land as plaintiff's tenant at a definite rent. If he had, then, quite apart from his title to the property on which he relies, he would have a right to claim payment of rent from this ryot on the footing of his being his own (so to speak) personal tenant.

It seems to me, then, that the decree of the Lower Appellate Court cannot be upheld upon the finding which seems to be expressed in the face of the judgment. But inasmuch as it appears that there is some evidence tending both ways with regard to the right of the plaintiff to recover rent from the ryot-defendant as his tenant, and the Judge has not in express terms come to a finding upon that point, I think the case must go back for

that purpose. The decree of the Lower Appellate Court must be reversed, and the case remanded for re-trial upon the question whether or not the ryot-defendant is bound to pay to the plaintiff the amount of rent which the plaintiff claims or any portion of it.

Costs will abide the event.

The 14th January 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Cause of Action—Damages.

Case No. 28 of 1873.

Regular Appeal from a decision passed by the Judge of Gya, dated the 4th November 1872.

Syud Mahomed Aboo (Plaintiff), *Appellant,*

versus

Lalla Bissessur Dyal and others (Defendants), *Respondents.*

Mr. C. Gregory for Appellant.

Baboos Romesh Chunder Mitter, Bhyrub Chunder Banerjee, Nil Madhub Sen, and *Boodh Sen Singh* for Respondents.

A suit will not lie for damages apart from the cause of action out of which the damages arise.

Phear, J.—It seems to us unnecessary to go into the grounds upon which this appeal is based, because we think that the objection, which has been made by the learned Counsel for the respondents, is a good objection—namely, that the plaint on the face of it shows that the plaintiff has no right of suit. He comes here to recover very heavy pecuniary damages which he says have been caused to him by the wrongful conduct of the defendants. But at the same time he says that he has already on a previous occasion brought a suit against these very defendants based upon the *same* wrongful conduct, and has obtained a decree of the local Courts, affirmed by this Court, to the effect that that conduct is wrongful. So that, in fact, according to the terms of the plaint, this is a suit brought upon the footing of the decree in the former suit to recover the damages which he might have got if he had asked for them in that suit.

We think that a suit of this kind will not lie: a suit will not lie for damages apart, so to speak, from the cause of action out of which those damages arise. There is not moreover, in the plaint to connect the pl iffs with the alleged loss as it is said to occurred. The plaintiffs are stated to b owners of the villages, and the loss is to have been in the shape of damaged deficient crops, &c.: this would be da and loss to the cultivators, not necessari the zemindars whose loss, if any, would been in the shape of deficient receipt of and profits; but there is no allegation the plaintiffs could not and did not re the full amount of rents and profits d them for the time covered by the pl The plaintiffs as zemindars simply s recover Rs. 29,000 from the defendant the ground that their ryots, by reason o defendants' wrongful conduct, have suff damage in their crops to that amount. truth, the plaint is as vague and bad as can be, and never ought to have been admi We are, therefore, of opinion that this ought to be dismissed with costs.

We think that the respondents, appeared separately, must have sep costs, and we will take time to consider the real amount should be.

The 15th January 1874.

Present:

The Hon'ble C. Pontifex and E. G. Bi *Judges.*

Act X. of 1859, ss. 24 & 33—Agency—Limitation.

Case No. 760 of 1873.

Special Appeal from a decision pas by the Judicial Commissioner of Ch Nagpore, dated the 7th January 18 reversing a decision of the Assist Commissioner of Maunbhoom, dated 29th June 1872.

Rajah Nilmonee Singh Deo Bahadoor (Plaintiff), *Appellant,*

versus

Ram Golam Bundopadhya (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboos Bhowan Churn Dutt* and *Oopendro Chunde Bose* for Appellant.

Baboo Gireeja Sunker Mojoomdar for Respondent.

A suit against an agent, under Act X. of 1859, s. 3 was resisted on the ground that defendant's employment as tehsildar had terminated by plaintiff having employed him as a moonshee, and defendant relied

f on the fact of his subsequent re-appointment as dar. The Lower Appellate Court construed s. 33 plicable to the case:

LD that this was not a correct interpretation of ection, and that, so long as defendant continued to ployed in plaintiff's service, his agency had not nated.

ontifex, *J.*—In this case, the plaintiff, a ndar, sued an agent of his, who had been g as his tehsildar in certain villages, under on 24 of Act X. of 1859. The defend- had been dismissed from the plaintiff's ce within one year of the suit being ght. The defendant had acted as teh- r for the years 1274, 1275, and 1276. suit was resisted on the ground that the ndant's employment as tehsildar in 1274 1275 had been terminated by the plaint- having employed him as a moonshee to after certain suits. In 1276, the plaint- re-appointed the defendant to act as ildar over the villages over which he had control in 1274 and 1276, and certain er villages. The defendant has relied on s re-appointment in the year 1276 as owing that his first employment as tehsil- had terminated when he was employed to as moonshee.

The Lower Appellate Court has construed ction 33 of Act X. of 1859, and applied it this case as if the agency of the defendant d absolutely terminated when he was ployed by the plaintiff as moonshee. We not think this is a correct interpretation of section. We think that, so long as the fendant continued to be employed in the intiff's service, it cannot be said that the ency had terminated. We think that, ring the whole of the years 1274, 1275, d 1276, the defendant never ceased to be e agent of the plaintiff, continuing in his ploy, and enjoying his confidence, and we not hold that the temporary employment moonshee was a determination of the fendant's previous employment as tehsildar. Under these circumstances we are of opinion that the zemindar is entitled to recover for the period allowed by the first Court.

The judgment of the Lower Appellate Court on the point of limitation will therefore be set aside; but, as the respondent desires that the Lower Appellate Court should try what amount (if any) is due for the years 1274 and 1275, the case will be referred to the Lower Appellate Court to consider the evidence as regards those years. If anything is found due, the defendant will pay the whole costs, and if nothing is found due, the question of costs will be in the discretion of the Court.

The 16th January 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Wills—Obligations of Donee or Legatee.

Case No. 728 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 5th December 1872, reversing a decision of the Moonsiff of Budeakhally, dated the 25th February 1872.

Ram Oottum Chowdhry (Defendant), *Appellant,*

versus

Oomesh Chunder Chatterjee and another (Plaintiffs), *Respondents.*

Baboo Kalee Mohun Doss for Appellant.

Baboo Gopal Lall Mitter for Respondents.

Parties in possession under a will, *i. e.*, a voluntary transfer without any consideration except that of family-affection, are not thereby bound to pay the debts of the former holder, whether the donee's possession began at the date of the instrument called a will, or after the death of the testator.

THE plaintiffs in this suit seek for a declaration of their title under a will executed by one Kashee Nath Roy on the 7th Pous 1263.

The defendant is a purchaser of the rights and interests of Kashee Nath Roy at a sale in execution held on the 22nd June 1870, 14 years after the date of the alleged will, in a suit against some third party as representing the estate, in which suit the present plaintiffs appear to have been no party. The genuineness of the will has been affirmed by the Lower Appellate Court, and it is also found that the plaintiffs were in uninterrupted possession of the land.

The first point taken in special appeal is that the plaintiffs having held under a voluntary

transfer, and there being no consideration for the will except that of family-affection, they are bound to pay the debts due from the former holder of the property. In support of this, the learned pleader for the special appellant cited a passage from Story on Jurisprudence. The only remark that I think necessary to make as to that authority is that Mr. Justice Story, after setting out what was the accepted law in England, distinctly states that, if it has any good ground at all, it is based upon certain statutes, and that probably in consequence of the great number of titles affected by judicial decisions it has become necessary to maintain the rule, but he goes on to express doubt whether in reality there is any sound foundation for it. The statutes do not, and the doubts do, apply to India, and it seems to me, therefore, that this authority is rather against than for the contention of the special appellant.

The next ground taken in special appeal is that the kubooleut has been improperly received in evidence, although it is unregistered. Now the Lower Appellate Court properly points out that, under the Registration Act of 1864, a kubooleut did not require registration. This has been distinctly laid down by a decision of this Court, and as far as I am aware its correctness has never been disputed.

There is then another objection, that a certain petition of 1277 has been improperly received in evidence. I do not think it necessary to call upon the respondent to show whether it was so or not, for assuming that it was so, and striking it off altogether, it seems to me clear that the removal of this one piece of evidence would have had no effect on the mind of the Subordinate Judge.

It is also said that the Lower Appellate Court has not sufficiently dealt with the objections taken by the first Court to the genuineness of the will, or considered the question of possession. It seems to me that there is no ground whatever for this contention. The Lower Appellate Court has expressed its opinion on the oral evidence, and I cannot see how the possession of the plaintiff, whether it commenced in 1263 at the date of the instrument called the will or after the death of Kashee Nath, can affect his right in the present suit. Whether he obtained possession in the lifetime of Kashee Nath and his title was affirmed by the will, or whether the document is to be taken as a deed of gift, is wholly immaterial.

The special appeal will be dismissed with costs.

The 16th January 1874.

Present:

The Hon'ble J. B. Phear, *Judge.*

Execution-sale—Sale-certificate—Possessi Right of Suit.

Case No. 867 of 1873.

Special Appeal from a decision passed the Subordinate Judge of Bhaugulp dated the 15th January 1873, affirm a decision of the Moonsiff of Ja dated the 30th July 1872.

Mussamut Boodhun (Plaintiff), *Appella*

versus

Boodhun Singh and others (Defendants) *Respondents.*

Moonshee Mahomed Yusuf for Appella

Baboos Unnoda Pershad Banerjee Chunder Madhub Ghose for Respondents

In seeking execution of a decree against K passed upon a debt due by D's father, the judgm creditor asked to have it realized out of the asse the father which had come into the hands of the de ants. An execution-sale was held, and, accordi the wording of the certificate granted, only the r and interests of K appear to have been expressly pa though the price seemed to answer to the full valu the assets. After purchase the judgment-creditor possession of the whole of the property without c plaint on the part of D. Many years after her de her heirs sold a share of the property to plaintiffs, sued for possession thereof. The suit was rejected the lower Courts.

The High Court, in special appeal, declined to in fere, holding that the plaintiffs obtained no immedi right to the property by the conveyance from D's he

Quære.—Could the plaintiffs set up a right of suit

I THINK I ought not to interfere this case with the decree of the Low Appellate Court. Both the Courts belo have, upon consideration of the executio proceedings in the former suit, come to th conclusion that the decree passed again Motee Khanum and Mussamut Doorgahun that suit was a decree upon a debt due b the father of the 2nd defendant and liable be satisfied out of the assets of the fath which had come to the hands of defendant

The judgment-creditor, in seeking execu tion of this decree, in terms asked to have realized out of the assets of the father which had come to the hands of the defend ants. It is true that, when the sale was had and the certificate granted, according to the wording of the certificate only, the right and interests of the widow, Motee Khanu

h

ear to have been expressly passed; but price appears at the same time to have n ample price in the judgment of both Courts to answer to the full value of assets. And then we have it that the gment creditor, after the purchase, took session of the whole of the property as if ad all been sold to him, and was allowed retain possession of the whole property hout the slightest complaint on the part Mussamut Doorgahun during the rest of life. On this state of facts, I think the rts were justified in coming to the con- sion that the father's property had, not- nstanding the terms of the certificate, in been sold, as it might rightly have been d. Mussamut Doorgahun had full know- ge of all that was done, and she allowed judgment-creditor to take possession, and retain possession of this property. It is y many years after her death that the sons claiming to be her heirs in respect of s property sell a share of it to the present intiffs, and upon the footing of that con- yance the present suit is brought. I do think that I ought, on special appeal, even the reasons alone which I have just now en, to interfere with the judgment passed the lower Courts.

But in this case there comes for considera- n a further point of very great importance deed, namely, whether the plaintiffs obtained, the conveyance from the heirs of Mussamut orgahun, under the circumstances which I e mentioned, any immediate right to the operty which they now seek to recover ssession of. According to the spirit of the e decisions of the Privy Council, which had occasion to consider and act upon a days ago, I should, I think, if it were cessary to decide the question, be obliged hold that no right of property did actually ss to the plaintiffs by that conveyance. hether a right of suit, such as that which e Privy Council there dealt with against e plaintiff's vendor, might not be set up in e present suit, it is not necessary, I think, me to determine, because there has been pretence in the case put before the lower urts of making out a primary claim ainst the vendors of the plaintiffs, and then rough those vendors to the property in the nds of the principal defendant. The suit s been placed entirely upon the single ound of the right of the plaintiffs to recover m the principal defendants immediate ssession of the property for which they e. Nothing else has been tried.

I therefore dismiss the appeal with costs.

The 16th January 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Act VIII. (B.C.) of 1869, s. 18, cl. 1 — "Places Adjacent" — Construction — Enhancement of Rent—Notice.

Case No. 616 of 1873.

Special Appeal from a decision passed by the Additional Judge of Tipperah, dated the 9th December 1872, affirming a decision of the Additional Moonsiff of Panchpookhoriah, dated the 1st September 1871.

Shaikh Dena Gazee (Defendant), *Appellant,*

versus

Baboo Mohinee Mohun Doss (Plaintiff), *Respondent.*

Baboo Huree Mohun Chuckerbutty for Appellant.

Baboo Romesh Chunder Mitter, Kalee Mohun Doss, and *Lall Mohun Doss* for Respondent.

The words "places adjacent" in Act VIII. (B. C.) of 1869, s. 18, cl. 1, cannot be restricted to lands in contact with that to which the rent-suit relates. The general rule may be stated to be that the plaintiff is not, on the one hand, restricted to a comparison with lands immediately contiguous, and must not, on the other, pick and choose particular places, but should consider the rates prevailing in all the neighbouring places which are similarly circumstanced.

The enhancement need not be to some rate which is actually paid. Where different ryots, holding similar lands with similar advantages in places adjacent, pay at different but higher rates for lands of the same description and quality, and the only question is the extent to which defendant is liable to enhancement, the clause must not be so construed as to deprive a zemindar of his fair rent; but the Court should be guided by a consideration of what is "fair and equitable," as provided by s. 5, subject to the limitations prescribed in s. 17. If a generally-prevailing rate cannot be found, the currency of the different rates being so nearly equal as to make it impossible to say which is the prevailing rate, the Court is not in error in taking an average.

The first fact to be established in a suit for arrears of rent at an enhanced rate is due service of notice; and, if that is disputed, a finding ought to be recorded before the Court goes into the merits.

THIS was a suit for arrears of rent at enhanced rates after notice.

The Judge, concurring with the first Court, has found that the plaintiff is entitled to enhance to a certain extent, though not to the full extent claimed.

The defendant has preferred this special appeal on six grounds:—

The first is that the Courts below have compared the rents of defendant's lands with

those of lands not adjacent within the meaning of clause 1, section 18, Act VIII. (B.C.) of 1869. Appellant contends that "adjacent" implies contact, *i.e.*, that the lands with which the comparison is to be made must be, at least, in some one point conterminous. No authority had been shown for this construction. *Contra*, the case in 5 Weekly Reporter, Act X. Rulings, page 70. The words of the clause are in "*places adjacent*," not in adjacent land. It was there held that there was no restriction as to the rates of the pergunnah or rates of the village, and that the Court must look to the rates prevailing in the *places adjacent*.

There is also a case in 1 North-Western Provinces Reports, Revenue Cases, page 64, directly on the point. In this case the Lower Appellate Court held the view now put forward by appellant. The High Court overruled the decision, and allowed the comparison to extend to lands even three or five miles distant. It is not necessary to enquire under what circumstances so wide a circle was taken. The decision at any rate determines that the appellant's construction is not maintainable. The words of the clause are also against the appellant. If so restricted an operation was to be given, they would have been adjacent *lands*, not adjacent *places*.

It is impossible to lay down any definite rule. In each case the Courts must determine as a fact whether the lands with which the plaintiff seeks to compare the defendant's lands are adjacent within the meaning of the Act. Where, from natural causes, the cultivation is scattered, the circle will be wide. Where the whole of the surrounding lands are under cultivation, the circle will be narrowed. The general rule may, I conceive, be stated to be that the plaintiff is not, on the one hand, restricted to a comparison with lands immediately contiguous, and must not, on the other, pick and choose particular places with which to institute a comparison, but that the Court should consider the rates prevailing in all the neighbouring places which are similarly circumstanced. Distance from the lands of the defendant is not *per se* a reason for refusing to notice the rates prevailing in a particular place, provided that the distance does not involve a substantial change of circumstances, such as greater facilities for disposing of the produce by proximity to a market, a road, or a river.

In sparsely-cultivated lands the distances may be considerable without involving any unfairness in the comparison. When the population is denser, and cultivation extended, it can hardly be that the dist if considerable, will not operate to pro a material difference in the value o lands of any two villages, and in such the area of comparison will be li What distance may, in any given cas taken as excluding particular lands comparison must be determined by the C from the facts disclosed by the eviden that case. Taking this view of the la applying it to this case, I find that the M siff has compared the lands of the defe with the lands in villages situated o borders of the same bheel, and sim circumstanced in every respect with village in which defendant's lands lie, an so far off from it as to make the dista material cause of unfairness in the parison.

The second ground of appeal is that not been properly found on the evidenc the lands with which the comparison been instituted are of similar descripti defendant's land, and with similar advan It is said that the defendant's lands, th least which are described as lall lands within the Bordas bheel, whereas the of the villages with which they have compared are not within the bheel, and the whole of Bordas bheel belong Moradnuggur within which the defend lands lie. Whether this bheel, in its ent is included within the boundaries of Mo nuggur need not be considered. It is c clear from the Moonsiff's judgment tha compared what are termed the lall land the defendant with the lall lands of villages, and the bheetee lands of the defe ant with the bheetee lands of the o villages. The oral evidence appears to been very conflicting, but the Moonsiff self inspected the lands, and was guided what he himself saw in judging of the v of the evidence. It cannot be said that was wrong to test the evidence in this way that the Lower Appellate Court was wr in accepting his recorded observations evidence in the case.

In the third place, it is contended that Courts were wrong in allowing enhance at a rate which is not the rate actually p in any of the villages with which the c parison was made, but an average rate ca lated by the Court; that the Courts are bo to find some rate actually prevailing; and th if they cannot declare any one particul rate to be that paid by a majority of t ryots in the neighbourhood, the plaint

ought to be dismissed. Three cases cited in support of this contention. first is in Hay's Reports for 1863 at 427. That case has no bearing on the nt suit. In that case, it was found that ates paid by the surrounding ryots were ame as the rates paid by the defendant, consequently a claim to enhance on a e framed under the 1st clause of section ct X. of 1859, could not be maintained. plaintiff sought to prove that the rates were too low all round, but though this have given good ground for a notice the 2nd clause of that section, it could not be considered in a suit as that was on a notice framed under e 1.

e next case is to be found in 1 Weekly rter, page 58. This was a suit to nce the rents of a ryotee holding of beeghas. The first Court rejected the ific rates reported by an Ameen deputed old a local inquiry, and took an average tes from the evidence of witnesses, and rently applied this average to the whole beeghas without reference to the rences in the qualities of land which almost of necessity have existed in a large block. The Lower Appellate rt, "in place of the average rate impro- awarded by the first Court, fixed certain ." How those rates were determined, judgment does not disclose. Other rial points had been overlooked, and the was remanded to the first Court to be *de novo* with the following remark: e Court will bear in mind that its option of the average rate from the erent rates given by the several wit- ses was an incorrect and unsafe mode of ing the proper rate, and that the onus of oving what the proper rates are is upon e plaintiff, and not upon the defendant." he facts of this case are not set out suffi- tly to enable me to ascertain what the Court had done. It may be that, as I suggested above, the Moonsiff had en *one average rate for the whole land*, I am inclined to think that this was e, for the Court does not say that the ption of *an* average rate for each descrip- of land was improper, but that the ption of *the* average rate (as if one eral average had been struck) from the erent rates given by the witnesses was rect; if so, the case has no bearing on present one. It is impossible to apply decision as a precedent, inasmuch as e are no means for judging whether the facts are identical with the facts of this or any other case that may be before the Court. Such a report as this is worse than worthless; it furnishes no guide, and may mislead.

The third case is reported in 6 Weekly Reporter, Act X. Rulings, page 45. In this case it is clear that the Judge below ignored the fact that the defendant's lands were not all of one description, and took an average rate over the whole. This clearly was an erroneous proceeding. In remanding the case this Court observed: "That the Judge "must find specifically whether the rate "claimed by plaintiffs is actually paid by the "neighbouring ryots *of the same class* for "similar lands, or what rate is so paid, and "decide accordingly." The Court did not lay down any rule to meet such a case as this in which it is found that different ryots holding similar lands with similar advantages in the places adjacent pay at different rates for lands of the same description and quality, such rates being in all cases higher than those paid by the defendant. Under such circumstances, it is evident that the defendant is holding at an unfairly low rate, and the only question is the extent to which he is liable to enhancement. It may be that, in strict accordance with the letter of the law, the Court was bound to determine which of the various rates paid in the neighbourhood was the prevailing rate, and the appellant might properly have urged that the higher rates were only paid for very small portions of land, and ought to be treated as exceptional and not fit to be considered in determining the rates generally prevailing; but he does not attempt to do this. It is not said, excepting so far as the next ground of appeal goes, that the mode of calculation has produced an unfair result. The contention is simply that, when the rates of neighbouring land have not settled to a level, there can be no enhancement at all, and that, whenever there is an enhancement, it must be to some rate which is actually paid. The word "actually" is not in the law, but is imported into it from the last judgment cited.

The respondent, on the other hand, relies upon a decision of the High Court, North-Western Provinces (1 North-Western Provinces Reports, Revenue Cases, 57), in which it was held that "it was not intended that, by "reason of the non-existence of similar lands, "&c., the zemindar should be deprived of "his fair rent. The proceedings of the "Deputy Collector were in accordance with "the spirit of the Act, and as nearly in com- "pliance with the letter of law as was

"practicable." In that case the Lower Appellate Court took the precise ground which the appellant contends for in this appeal. The High Court overruled this decision, and held that the clause was not to be construed with such strictness as to deprive a zemindar of his fair rent. This view is one which commends itself as perfectly equitable; and as pointed out in several places in the judgments reported in 3 Weekly Reporter, Act X. Rulings, page 29, *et seq.*, the proceedings of the Collector (now the Civil Court) are to be guided by a consideration of what is "fair and equitable," as provided by section 5, subject to the particular limitations prescribed in section 17. It could hardly be intended that where a zemindar proves that his lands are held at a rent below their value, he should be debarred from getting an increase, because it is difficult to determine what amount of increase he is entitled to. If a distinctly-prevailing rate can be found (in this case I understand that it cannot), of course that must be adopted; if such rate cannot be found, and if, as in this case, the Court comes to the conclusion that the currency of the different rates is so nearly equal as to make it impossible to say which is the prevailing rate, the Court is not in error in taking an average; in other words, although, as a general rule, it is wrong to proceed by striking an average, yet, under special circumstances, it may be the only and, therefore, the proper course to adopt.

Fourthly, it is urged that, if it be allowable to proceed by striking an average, the calculation is in itself erroneous. The Moonsiff compared the rents of defendant's land with the rents of six other villages; he found in these villages the following rates for lands of the same class: Re. 1-12, Re. 1-5, and Re. 1-1, As. 13, As. 13, As. 12-9. He took these as four rates, and struck an average by adding these four together and dividing by four, and it has been contended by the respondent that this was a proper mode of calculation. On the face of it there is an error here. If one person pays Rs. 6, and two persons pay Rs. 3 each, the whole three persons pay Rs. 12, or at an average rate of Rs. 4; but there are only two rates, and, according to the Moonsiff's proceeding, these are to be added together, making Rs. 9, and divided by Rs. 2, giving a resulting average rate of Rs. 4-8; but three persons paying at an average of Rs. 4-8, would pay Rs. 13-8 and not Rs. 12. It is evident that, in striking an average, all the rates paid by all the persons or classes of persons must be added together, and the total sum so obtained must be divided by the total number of persons or classes of persons; this would give a result of Re. 1-1-6 instead of Re. 1-4 for first-class lall lands.

Whether, even in this way, a fair and proper average can be arrived at is doubtful, but it is unnecessary to consider this, as if no average is to be taken at all, this is all that the appellant contends for.

The fifth point is that the Judge was bound to find as a fact whether there had been actual service of notice of enhancement on the defendant. It is greatly to be regretted that the Judge thought that this was a mere technical objection not worth consideration. The first fact to be established in such a suit is due service of notice, and as that has been disputed, the Lower Appellate Court ought to have recorded a finding on it before going into the merits.

It is impossible to assume that the Lower Appellate Court confirmed the finding of the Moonsiff on this point, because he has confirmed it in all other points; for he distinctly records that he does not intend to decide the question. He says it is a technical objection which must be allowed to drop; but this is a suit not to determine enhanced rates for the future, but to obtain payment of rents already due at enhanced rates, and unless there was proper notice to the defendant, the plaintiff has no right whatever to the excess over the rates previously paid.

The last point is that, even if there was evidence on which the rents of lall and bheetee lands of the first quality can be assessed, there was none to establish the value of the lands of inferior quality, and that this was determined by a mere arbitrary assumption. The principle of the decision of the High Court, North-Western Provinces, above cited, applies here, and, independently of this, there is, besides the personal observation of the Moonsiff, evidence of witnesses, as pointed out by Baboo Romesh Chunder Mitter, which shows the difference of rates between these classes of land. It may be granted that these witnesses exaggerated the value of the first-class lands, and were not believed as to their actual value, and it may be inferred that they have similarly overstated the value of the second-class land; but, although the evidence of actual values may not have been accepted, it, by no means, follows that so much of the evidence as shows the difference in value of the different classes

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improperly acted on by the Courts w.

is unfortunate that I am not in a posi- to make a final decree. The case must back to the Judge for a finding whether e was due service of notice. If that is d for the plaintiff, the Judge will make decree modifying the decree of the first rt as indicated in disposing of the 4th nd of appeal. The question of the ciency of the notice (assuming it to have n properly served) was also raised, but sufficient ground for holding it insufficient made out. The only question now ved is whether the notice was served or The costs will follow the result.

The 16th December 1873.

Present:

he Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble J. B. Phear, *Judge*.

Agency—Authority (actual or apparent)—Liability.

Appeal from the judgment of the Hon'ble A. G. Macpherson, exercising the Ordinary Original Civil Jurisdiction of the High Court.

W. Spink and others (Defendants), *Appellants*,

versus

W. Moran and others (Plaintiffs), *Respondents*.

Messrs. Kennedy and *W. Jackson* for Appellants.

Messrs. Lowe and *Fergusson* for Respondents.

By an agreement made on 22nd July 1862 between C and T (since deceased) and the defendants P and S, C agreed to sell, and T, P, and S to purchase, a half share in the lands, plantation, and estate belonging to C, known as the Laojan Tea Estates and Grants. The agreement provided that C was to conduct and manage all matters and affairs of the estates, but nothing was said as to its being done in his own name or in that of the partners of any firm. Money to carry on the business was provided by means of bills drawn by the local manager upon C in the same manner as if he (C) had been the sole owner, defendants being fully aware of this, and finding the funds. This mode of dealing continued down to the time of the transaction which is the subject of this suit.

The only act in the way of notice to the public on the part of the defendants was a notification in a Directory published by them in Calcutta (T, S, & Co. being booksellers and publishers), in which, in the list of tea estates, the Laojan Concern is mentioned, and C, T, P, and S are named as proprietors. In the Directory for 1870 and 1872, C is also described as Calcutta agent.

This suit was brought to recover a balance due in respect of moneys alleged to have been advanced by the plaintiffs on the tea to be manufactured in the season 1872; plaintiffs being tea-brokers who made the advances on the security of tea-invoices and bills of lading. The terms on which the required advances were to be made were arranged by an agreement dated 9th February 1872 between C and plaintiffs, who were under the belief that C was the proprietor of the Laojan Concern, and not merely manager. By reason of C's death, and the non-delivery of a portion of a season's tea, plaintiffs were unable to reimburse themselves for their later advances, and brought the present suit against defendants, who, they contended, were bound by all C's acts and dealings:

HELD, *by Couch, C.J.*, that, assuming that plaintiffs knew what was in the Directory, it cannot be considered as a notice to them that the authority which C had been exercising, and which he continued to exercise with, so far as it related to bills and drafts drawn by the local manager, the knowledge of his partners, the defendants, had been determined, and that he had only the authority of an ordinary Calcutta agent:

HELD, *by Couch, C.J.*, that the question in the case was whether the transaction between C and the plaintiffs was within the scope of the authority which C had, or was allowed by his partners to appear to have, in managing and conducting the affairs and business of the partnership. It was a question of actual or apparent authority, and whether the transaction was one which the owner of a tea-garden carrying on the cultivation of it would, in the ordinary course of business, enter into:

HELD, *by Couch, C.J.*, that the transaction would have been according to usage if C had been the sole owner of the gardens, and the defendants, by allowing him to manage ostensibly as sole owner, clothed him with every authority incidental to a sole owner in that business. The defendants were therefore bound by the agreement of the 9th February 1872.

The judgment appealed against was as follows.—

Macpherson, J.—THIS suit is brought to recover a balance due in respect of moneys alleged to have been advanced by the plaintiffs on the tea to be manufactured in the season 1872 on the Laojan and Namtee Gardens in Assam. The Laojan and Namtee Tea Gardens originally belonged to one Carter, who is now dead. In 1862 he sold one moiety of the property, which then consisted, principally if not entirely, of uncleared lands, to the defendants Spink and Parbury, and William Thacker who has recently died, but is duly represented in this suit. By the agreement of the 22nd of July 1862, under which Carter sold to Messrs. Spink, Parbury, and Thacker (whom I shall speak of simply as "the defendants"), it was agreed (para. 4) that the defendants should provide all funds necessary for cultivating, clearing, and carrying on the lands and plantations; and (para. 5) that, whilst in Calcutta or within the province of Bengal, Carter should conduct and manage all matters and affairs of the said estates, but, subject to the defendants' assent and approval,

From 1862 down to the date when he finally left Calcutta in July last, Carter, save when absent on certain short visits paid by him to England, acted in Calcutta as agent for, and manager of, the affairs of the Laojan and Namtee Gardens; all funds necessary for cultivating, clearing, and carrying on the gardens were, from time to time, provided by the defendants on requisitions from Carter. On the accounts between the defendants and Carter connected with these gardens, a very large sum, amounting to several lakhs of rupees, is due to the defendants. This sum is charged on Carter's eight-annas share in the concern, which share is also said to have been mortgaged by Carter to the Bank of Hindoostan for a large debt.

Throughout, the business of the gardens was conducted in the name of Carter only, and through him only, although he was kept in funds by the defendants. The chests of tea sent down as manufactured from the gardens were marked and sold with his initials T. E. C. only; the correspondence connected with the gardens was in his name only; when the managers at the gardens had occasion to draw bills on Calcutta (which they did with the defendants' knowledge and assent, when necessary), they drew them on Carter only; and, generally, the only name used in public, or known to the public, in connection with the management and conduct of the business of these gardens, was the name of Carter.

The gardens began to bear in 1865, in which year a very small quantity was manufactured; and the tea produced in 1866, 1867, and 1868 was sent to London by Carter to Thacker & Co. for the defendants. But, on Carter's suggestion, the defendants authorized his selling in Calcutta the produce of the subsequent seasons: and the tea of 1869, 1870, 1871, and 1872 (up to Carter's death) was accordingly sold by Carter's order at the Tea Marts in Calcutta.

The tea of 1869 and 1870 was sold by Carter through Messrs. Cresswell & Co., tea-brokers, who, in each year, made advances to him against the produce. In October 1871, Carter transferred his business from Cresswell & Co. to the plaintiffs, and he obtained large advances from them, making over to them as security invoices and bills of lading of the Laojan and Namtee Teas of that season, out of the sales of which the plaintiffs reimbursed themselves.

The terms upon which the plaintiffs were to make the required advances were arranged between Carter and the plaintiff Murdoch. In making these arrangements, and subsequently, until after Carter's death, Mr. Murdoch was under the belief that Carter was the proprietor of Laojan and Namtee Concerns, and not merely the manager. Murdoch might easily, if he had chosen to inquire, have discovered that the defendants were partners with Carter in the gardens. As a matter of fact, he made no inquiries, but acted with entire honesty and with no specific negligence, though, perhaps, without much vigilance, in the belief that the advances were required for the purposes of the gardens and relying on the promise of Carter that each advance made should be covered by the consignment to the plaintiffs of a sufficient quantity of the tea manufactured at the gardens.

It is customary for the owners of the tea gardens to borrow money for the purposes of their gardens on the security of the produce or season's crop; and advances are, constantly and in the ordinary course of the management of such concerns, obtained upon such security. The plaintiffs are tea-brokers and salesmen, and it is, in the ordinary course of their business, to make advances to tea-concerns on the security of the produce.

In February 1872, Carter made fresh overtures to the plaintiff for advances against the coming season's produce. On the 7th of February he wrote to Mr. Murdoch: "I shall "probably want Rs. 40,000 to 50,000 during "the year, to be drawn for at three months by "instalments, as you may agree to, from time "to time. At present I only want to draw "for Rs. 15,000 The whole of the tea, estimated at 1,000 maunds, to be made over to "you for sale so long as you are under "acceptance. * * *"

Negotiations followed upon this letter, and Carter was asked to sign a formal assignment of the tea; but at first objected to do so. On the 8th February he wrote to Murdoch: "I would rather not sign either of the accom- "panying forms, as it would be making too "much fuss about a trifling matter. If "Moran & Co. like to give me their acceptance, "I will undertake to cover it with docu- "ments before maturity, when we can, if "they like, repeat the operation, and so go "on throughout the season, if it pleases them, "or stopping whenever they choose. This "is precisely what we have done hitherto, "and I should like to continue the arrange- "ment as most convenient. As for the tea "not having been made yet, we shall com- "mence this month—the season promising to "be an early one."

On the next day (February 9th) he nevertheless did sign one of the forms alluded to. In that he says: "I certify and declare that I will hold the entire quantity of tea to be made this season at the Laojan and Namtee Tea Gardens in Assam as the property and at the disposal of William Moran & Co. for and on behalf of the said William Moran & Co., and that I hereby undertake to continue so to hold the above tea for the sole use and disposal of the said W. Moran & Co., or at the order and direction of the said W. Moran & Co., and to consign it at the usual period, or when required, under invoice addressed to the said William Moran & Co., or to their order." Having got this document signed, Murdoch agreed to allow Carter to draw on Moran & Co. in the manner proposed; and upon the security thus given, the plaintiffs made further advances from time to time to Carter, who made over to them all the tea that came down from the gardens.

In July 1872, Carter went to England, intending to be absent for only a few months, and the affairs of the gardens were managed by Mr. Behrends, who continued the course of dealing commenced by Carter, and gave up to the plaintiffs all the tea that arrived in Calcutta. I think there is no doubt that the defendants are bound by all that Behrends did, quite as much as if it had been done by Carter himself.

In the end of August news reached this of Carter's death at sea on the 14th. Thereupon the defendants came forward and took over the management of the affairs of the gardens; and from that time no more tea was allowed to reach the plaintiffs.

By reason of the non-delivery of the remainder of the tea, the plaintiffs have been unable to reimburse themselves for their later advances to Carter on their account, with whom a balance of Rs. 15,629-3-3 remains due. The object of this suit is to recover this sum from the defendants, who, as the plaintiffs contend, are bound by all Carter's acts and dealings, and ought, under the arrangement made by Carter in February 1872, to have made over to the plaintiffs all the season's tea; and, not having done so, are liable for the balance now due.

As a matter of fact, Carter did not apply to the purposes of the gardens any of the money borrowed by him from the plaintiffs; and it was not necessary for the purposes of the gardens that any money should be borrowed by him. Carter applied the money to his own private uses; and the question now is, which of two innocent parties is to bear the loss which has been caused by Carter's fraud.

For the defendants it is contended that the plaintiffs gave credit to Carter personally, and not to him as proprietor or manager of their gardens; that Carter, as managing partner, had no authority to bind his partners for money borrowed by him on the security of the season's crop or otherwise; and that the plaintiffs knew, or, but for their own gross negligence, might have known, what Carter's true position was.

These are the material defences raised. It was also contended that no valid pledge or assignment of the season's tea had been given, which could have been enforced even as against Carter. It seems to me sufficient to say of this objection, that, in my opinion, there was an assignment of the tea, which was clearly valid as against Carter, to the extent of giving the season's tea to the plaintiffs as security for all moneys advanced by them.

The money received by Carter was obtained by him by discounting bills of exchange drawn by himself on the plaintiffs, and accepted by them. Mr. Kennedy has argued that there can be no liability on the part of the defendants in respect of their bills, because the bills are all drawn by Carter in his own name, and do not purport to have been drawn by him as proprietor or manager of these tea-gardens. But it is proved, and indeed admitted, that the whole business of the gardens, so far as the public were concerned, was always carried on in the sole name of Carter, and that no other name ever was used. Supposing Carter and the plaintiffs had been expressly intending to bind the concern and all who had shares in it, the name of "T. E. Carter" is the name which, under the circumstances, would naturally have been used. For the facts all lead to the conclusion that, had the bills been drawn with the defendant's knowledge and by their order, they would, in the ordinary course of business, have been drawn, in the name of Carter alone, exactly as they were. If the owners of the Laojan and Namtee Gardens did not carry on their business under the name or style of "T. E. Carter," they certainly did not carry it on under any other name or style.

A more serious argument was that this was not a common commercial trading partnership in which one partner has power to bind his co-partners by bills drawn by him for the partnership. Dickenson *vs.* Valpy

(10 B. and C. 128), and other cases of that class, were referred to; and it was contended that a tea-garden is to be treated as an English farm is, and that it is settled law that one partner in a farm cannot draw bills so as to bind his co-partners, because it is not necessary for the purposes of farming in England that bills of exchange should be drawn at all.

Whatever may be the English Law as to the position of partners in a farm, I consider it quite impossible to liken an Indian tea-garden to a common farm in England. It would be much nearer the true mark to liken an Assam tea-garden, such as the Laojan and Namtee Concern, to something in the nature of a West Indian estate, such as is discussed in the case of Chambers *vs.* Davidson (1 L. R., P. C., 296); or of an Australian sheep-farm, such as is discussed in Ayres *vs.* The South Australian Banking Co. (3 L. R., P. C., 548). From this last case it, amongst other things, appears that the Legislature of South Australia has passed an Act the effect of which is to make a pledge of the wool to be clipped from the sheep of a farm valid at common law as well as in equity; for in equity it would create a valid charge even independently of the Act.

It has been proved in the course of the hearing, and it is a matter as to which I entertain no manner of doubt, that the obtaining advances against the tea produced is a common and ordinary incident to the business carried on by proprietors of tea gardens, especially of tea-gardens only just come into bearing as Laojan and Namtee were. This being so, I know of no reason why one partner, being also the manager appointed by his co-partners, should be said not to have power to bind the others by drawing bills to enable him to obtain necessary advances upon the security of the crop. Third parties have nothing whatever to do with the private arrangements made by partners as among themselves, so long as they are ignorant of those arrangements. And, in the absence of notice to the contrary, a managing partner has, undoubtedly, so far as third parties are concerned, power to bind his partners in all matters incidental to carrying on the business in the usual way. If, in this present case, Carter had really spent upon the gardens the money which he borrowed, probably the present defence would never have been set up. But, as matter of law, the fact, that the money was misappropriated by Carter, really does not affect the plaintiffs' position at all, because they, having lent the money *bonâ fide*, were in no way bound to see to its application.

But this case seems to me to depend more upon the peculiar position which Carter was permitted by the defendants to occupy with reference to these gardens than upon any naked question as to the general power of one partner in a tea-concern to bind another. It is true that many persons may have been acquainted with the fact that the defendants held shares in these gardens, and that any one who had taken the trouble to inquire might have found out that such was the case. For example, and this appears from the copies of the letters produced by the plaintiffs themselves—since 1867 at least, the defendants in their name of Thacker, Spink, & Co., booksellers and publishers, have yearly published a Directory containing what purports to be a list of the gardens in Assam, with the names of the proprietors, Calcutta agents, and local managers. In that list, the names of the defendants are always given as being co-proprietors with Carter. Carter's name appears as the Calcutta agent in each year except 1867. In that year Carter was in England, and "Thacker, Spink, & Co." were given in the list as the Calcutta agents for the gardens. But, so far as the public are concerned, the defendants have never, at any time in any way, interfered with Carter's management, and have never come forward as the real owners of the concern. As I have already said, they have throughout allowed Carter to deal with the gardens as if they belonged to him alone. The tea manufactured arrived here marked only with Carter's initials, and consigned to his order, and from 1869 it was always sold publicly at the Tea Marts as being his property; and to him alone were the accounts of the sales rendered. All the while the defendants through Mr. Spink, or the managing representative of the firm of Thacker, Spink, & Co, were actually present in Calcutta and in daily communication with Carter; but, unfortunately, they placed implicit trust in him, and exercised no real supervision over him. In each of the years 1869, 1870, 1871, and 1872, Carter borrowed largely against the produce; and it is difficult to see how the defendants could have failed to discover what was going on had they exercised any vigilance. Had they, for instance, kept an eye upon the sales of the tea sent down to Calcutta which was sold by Cresswell & Co, and had they made any inquiry into the state of Carter's

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ants with Cresswell & Co. in connec- with that tea, the whole fraud must been discovered long before Carter ever any dealings with the plaintiffs.

he defendants' position is most unfor- te, and it is impossible not to feel for in the heavy loss which they have ained through the misconduct of one n they trusted as a friend. Still the ndants having, as it were, stood by, and, eir conduct, enabled Carter to obtain loans in the way he did from the ntiffs, I think it is quite clear that they not now be heard to say that Carter acted out their authority, and that they are not d by his acts. No doubt a gross fraud been committed by Carter; but, in every t of view, it seems to me that it is on the ndants rather than on the plaintiffs that loss must fall.

he plaintiffs are entitled to a decree for balance claimed with costs 2.

he defendants appealed from this judg- t on the following grounds:—

st.—That the learned Judge should have d the defendants not liable on the bills wn by Carter and accepted by the ntiffs, they not being parties to the same.

and—That the learned Judge was in error holding that these defendants carried on ir joint business as co-owners or co-pro- tors of the Laojan and Namtee Tea tates in the name of Carter.

3rd.—That the learned Judge was in error holding that the bills drawn in the name Carter were drawn in that name as presenting the partnership-business in hich these defendants and Carter were ntly interested, and not drawn by Carter his own name, and on his own individual count.

4th.—That the learned Judge ought to ve held the business carried on by these fendants jointly with the said T. E. Carter co-proprietors of the Laojan and Namtee ea Estates was not such as to authorize the id T. E. Carter issuing the said bills, nor ch as to render these defendants liable hereupon.

5th.—That these defendants were, in no y, liable for the moneys borrowed by the id T. E. Carter, the same not being on be- lf of, and as representing, the partnership- siness carried on by these defendants with e said T. E. Carter, but borrowed by the id T. E. Carter in his own name, and on s own individual account.

6th.—That, even if the said T. E. Carter borrowed the same as, and on behalf of, the said partnership, and not in his own name and on his own account, these defendants are not liable, it not being within the scope of the said partnership-business, and Carter not being in any way authorized to bind them.

7th.—That no valid charge was created by the document of the 9th February on the tea-produce of the year 1873 of the Laojan and Namtee Gardens, which the learned Judge held to be not an instrument evidencing a pledge of property for securing the payment of money.

8th.—That the learned Judge was not justified in holding that the conduct of the defendants in reference to Carter's management of the said tea-gardens had altered their position with reference to the plaintiffs.

9th.—That, even if these defendants were liable for the acts of Carter, they were in no way bound by the acts of Behrends.

10th.—That the learned Judge, instead of decreeing the plaintiffs' claim, should have dismissed the same, and should have further ordered the plaintiffs to pay to these defendants the sum of Rs. 10,963-0-3, being the price of 135 chests of tea sold by the plaintiffs on the 5th October, at which time they were fully acquainted with the claims and rights of these defendants thereto, and the learned Judge should have also ordered the plaintiffs to pay the costs of this suit.

11th.—That the learned Judge was wrong in rejecting evidence showing that, at the time of the advances by the plaintiff, and from a period long anterior thereto, the said T. E. Carter had ceased to have any interest whatever in the said tea-estates.

The following are the judgments of the Appellate Court:—

Phear, J.—The plaintiffs in this suit carry on business in Calcutta as merchants, commission-agents, and general produce-brokers.

The defendants, Spink and Parbury, together with Thacker, now deceased, who is represented in this suit by his executor and executrix, were part-owners of certain tea-gardens in Assam, known as the Laojan and Namtee Tea Gardens, the cultivation of which they have for some years carried on upon the footing of a certain partnership in the mode which will be presently described.

On the 7th February 1872, one Thomas Emerson Carter, since deceased, but then

carrying on business in Calcutta, wrote to the plaintiffs as follows:—

"My Dear Murdoch,

"I shall probably want Rs. 40,000 to 50,000, during the year, to be drawn for at three months by the instalments as you may agree to from time to time. At present I only want to draw for Rs. 15,000. The whole of the tea, equivalent to 1,000 maunds, to be made over to you for sale so long as you are under acceptance. If you are at any time under cash-advance, which is not probable, the account to carry interest at 10 per cent.

Yours sincerely,

T. E. Carter."

In the preceding year the plaintiffs had advanced money to Carter in the manner suggested in this letter upon the security of tea consigned to them by Carter for sale.

The plaintiffs, in reply to this letter, wrote as follows:—

"Dear Sir,

"In accordance with the request contained in your favour of 7th instant, we shall have much pleasure in honouring your acceptances upon us to provide for the outlay of your tea-gardens in Assam.

"We note you require at once an acceptance of Rs. 15,000 at three months' sight, which we shall be happy to give upon your signing this assignment herewith. Be good enough to fill in the names of your gardens, and initial the various alterations in the assignment.

"It is understood that you will hand us the bills of lading for the tea as they may arrive, and, in the event of any of your drafts maturing before we are covered by proceeds of tea, we are at liberty to charge you interest on such balance at the rate of 10 per cent. per annum.

Yours faithfully,

William Moran & Co."

And a few days afterwards Carter gave the plaintiffs the following written undertaking signed by him:—

"In conformity with the tenor of a letter "received from William Moran & Co., dated "the 9th day of February, and pursuant to "directions received from William Moran "& Co., I do hereby certify and declare that "I will hold the entire quantity of tea to be "made this season at the Laojan and Namtee "Tea Gardens in Assam as the property, "and at the disposal, of William Moran & "Co., for and on behalf of the said "liam Moran & Co.; and that I hereby u "take to continue so to hold the abov "for the sole use and disposal of the "William Moran & Co., or at the order "direction of the said William Moran & "and to consign it at the usual period "when required, under invoice addresse "the said William Moran & Co., or to "order, dated at Calcutta in "this ninth day of February in "year of our Lord One Thousand E "Hundred and Seventy-two.

T. E. Car

In pursuance of the agreement embo in the foregoing letters and undertaking, plaintiffs in Calcutta made advances to Ca and accepted Carter's bills of exchange, Carter made to them consignments of admittedly the produce of the Laojan Namtee Tea Gardens, which the latter and, after the net proceeds of the sales credited to Carter, there was, on the November 1872, the sum of Rs. 15,62 due on these transactions from Carter t plaintiffs.

Carter died in July or August 1873 on his way to Europe. During Carter's and at the time when they contracted him, the plaintiffs believed that he was owner of the Laojan and Namtee Gardens, and entitled to the produce the and they were unaware that the defend were in any way interested in the gar until they were so informed by a Mr. Br an assistant in the firm of Thacker, Sp & Co., in the month of September 1872. fact, however, Carter was the agent Calcutta of the owners of the gardens, also owner of a share in them, which had mortgaged for its full value. But money obtained by him from the plain under the terms of the foregoing ag ment was borrowed for, and applied his own purposes only. The plain now say in this suit that Carter re sented himself, and acted as owner in t management of the said tea-gardens, in realizing the produce thereof with the knowledge and consent of Thacker, Parbu and Spink, who, in the discussion of case, may be conveniently designated defendants. They further say that making the before-mentioned agreement the plaintiffs, and in receiving the advan from them, Carter acted as the agent of defendants.

On these grounds the plaintiffs maintain

they have a valid equitable lien on the ce of the said tea-gardens which has to plaintiffs' hands since October 1872, the crop of that year; and also that efendants are bound to repay them the ce of the money advanced to Carter.

e written statement of the defendants a full explanation of the relations h subsisted between Carter and them- s in the matter of these tea-gardens. substance of it is that at first Carter elf was the sole proprietor of the dens, and that in 1862, being then in need nds and assistance, he sold a moiety em to the defendants upon the terms h are embodied in an agreement dated and July 1862. By this agreement it stipulated that the price of the share ht by the defendants should be the egate amount of all sums expended by r upon the gardens up to the date of greement, and that the price, when paid, ld stand as a charge upon the estate, ing interest at 5 per cent. per annum, and ld be paid to the defendants out of the duce of the estate before any division of profits or gains thereof. Also, that the endants should provide all funds neces- for cultivating, clearing, and carrying the gardens, which should bear the like rest, and be repayable in like manner as stipulated with regard to the price. further that, whilst in Calcutta, or in the province of Bengal, Carter should nage all matters and affairs of the estate, ject, nevertheless, to the assent and roval of the defendants. The defendants' itten statement also says that, from the e of the just-mentioned agreement up to date of the present suit, the defendants nd and provided all the funds necessary d required for the working of the said dens.

The evidence of Mr. Spink, one of the fendants, amply supports these statements; d the plaintiffs do not, in any degree, peach the truth of them.

There is now no doubt that Carter defraud- the defendants of very considerable sums money, intercepted by him in a most genious way, from the profits of the dens. He obtained advances from pro- ce-brokers on the consignment of the tea: , out of the account-sales rendered to m on these transactions, he, from time to e, selected a few, and, omitting dates, and ering the name, sent them to the defend- nts as representing the whole of the tea d; the price realized by this limited portion of the produce he made good out of the advances which he obtained. The remainder of these advances he put into his own pocket.

The state of the case, then, between the parties, exclusive of this ingredient of fraud, seems to be shortly this: Carter, in Calcutta, managed the tea-gardens on behalf of himself and the defendants, his co-partners, subject to their supervision and approval, and to the express condition that the defendants should provide the funds necessary for carrying on the concern; and they did so provide them. The plaintiffs, in entire ignorance of the defendants' interest in the matter, and in the belief that Carter was the sole owner of the gardens, entered into the contract of February 1872 with him alone. It is important to bear in mind that the plaintiffs themselves say they did not contract with Carter on the faith of his being agent of the defendants or of any one else. The Court is therefore not called upon to consider any question as to the extent to which the defendants held out Carter to the world as their *agent*.

Notwithstanding, however, that the plaintiffs contracted with Carter as sole principal, three distinct grounds may be put forward based on well-known principles upon any of which, if made out, they would be entitled to have recourse to the defendants, and to call upon them to carry out Carter's contract.

The first is that Carter did, in fact, in the matter of this agreement, act as the agent of the defendants;

The second, that Carter was endued by the defendants with such power or dominion over their property as enabled him to create, in favour of the plaintiffs, the right of lien, which it was the purpose of the agreement to pass;

The third, that, even if neither of these two first grounds is established by the facts, yet the defendants have so conducted themselves towards the plaintiffs in the matter, that a Court of Equity ought not to allow them to deny that Carter had the power to give the plaintiffs this lien.

Of these the first is readily disposed of. It is clear on the evidence that it was not for the purposes of the partnership, or in the ordinary course of the partnership-business, that Carter assigned the garden's produce to the plaintiffs, and, on the security thus furnished, obtained the advance of money from them. So far as we have been informed, the business actually carried on by Carter for the defendants did not, at any time, involve

anything more in its principal features than the cultivation of the gardens, the manufacture of the tea, and the sending the produce to market. The money required for carrying on this business was all supplied by the defendants; and it was not *in fact* incidental to the business which Carter carried on for the partnership, that he should borrow money on any terms whatever.

And here, again, it appears important to remember that Carter only professed to bind himself personally. Had he, in this transaction, dealt with the plaintiffs under a partnership style, or in a name which might cover undisclosed partners, then the broad question would have arisen whether or not the transaction itself was such as to fall within the general character of the business, and was therefore such as the plaintiffs might reasonably suppose to be a partnership transaction. The principle laid down by Mr. Justice Macpherson, that, "in the absence of notice to the contrary, a managing partner has, so far as third parties are concerned, power to bind his partners in all matters incidental to carrying on the business in the usual way," is, I need not say, most correct; but I venture, with great deference, to think that it has no application to a case where the contract does not, either expressly or impliedly, purport to bind a partner. In such a case the question is narrowed to this, namely, was the transaction, which forms the subject of the contract, in fact, done for the partnership? for the general rules here come into play, which I will summarise thus, namely, that a contracting party cannot fix a third person (other than the party with whom he contracts as principal) with responsibility for the contract, unless that third person was either himself, in fact, the principal, though undisclosed, for whom the contract was made, or his conduct, bearing on the matter of making the contract, has been such that it would be equivalent to committing a fraud, actual or constructive, on his part if he evaded the responsibility. Evans *vs.* Bicknell, Freeman *vs.* Cooke, Swan *vs.* Australasia, &c., Company, are authorities for this position. Mr. Justice Macpherson appears, however, to have thought that, in the business of carrying on these gardens, the name of Carter was substantially the partnership name; he does not, indeed, say so expressly, but, in one passage, he remarks: "If the owners of the Laojan and "Namtee Gardens did not carry on their busi-"ness under the name or style of T. E. Carter, "they certainly did not carry it on under "any other name or style." I confess that I am not able to take this view of the ma and I will endeavour presently to ex the reasons why I do not. For the mo it is enough to say that not only were defendants, beyond all question, totally i rant of this transaction between Carter the plaintiffs, but it seems to me perf plain that it had nothing to do with affairs; that it touched Carter, and C alone. In short, Carter was in no degre defendants' agent in making this agree with the plaintiffs.

The second ground may be looked at two aspects—either the defendants may expressly given Carter a power of de with their property as owner, or they have done so impliedly by placing him in a position with regard to it as in the ordi practice prevailing with respect to the duct of concerns of this kind carried w that power. And in either mode, if plaintiffs' claim is to be established, C must have come into the situation of tr of this property for the defendants, r than into that of their agent. Now, power which the defendants expressly directly gave to Carter over their pro is to be ascertained from the written con which they made with him, interpreted need be, by the light of the after-behav both of themselves and of Carter in re to it. Mr. Justice Macpherson appears justly to have considered that the prin turning point of the case is to be found He says: "This case seems to me to dep "more upon the *peculiar* position which C "was permitted by the defendants to oc "with reference to these gardens than u "any naked question as to the general po "of one partner in a tea-concern to "another." And the conclusion at which arrives with regard to it, if I rightly app hend his words, is that the defendants in fact give Carter authority and power manage the concern substantially in all spects as if it were his own.

If, however, Mr. Justice Macpherson do not place the defendants' conduct in matter higher than laches or acquiescen then it will fall to be dealt with under third of the above-mentioned grounds.

Now, turning to the defendants' cont with Carter, the only passage in it, direct bearing upon the point which is before us the following:—

"Whilst in Calcutta, or within the pr "vince of Bengal, the said Thomas Emer "Carter shall conduct and manage all matt "and affairs of the said estates, subje

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...theless, to the assent and approval of ...aid William Thacker, George Parbury, ... William Spink."

...is remarkable that there is here no men...of, or allusion to the use of, a partnership ... And nowhere else in the contract is ... any stipulation as to the name in which ...partnership affairs were to be transacted. ...ever, Carter did, in carrying on these ..., uniformly use his own name only (as ...presently be more particularly mentioned) ...out any apparent interference with him ...e part of the defendants. It is urged ... this basis that the defendants did, in a ...al manner, commit the business to Carter ... carried on by him in his own name, and ... own way, for the benefit of, or rather ...y say in trust for, them; that they, in ... delegated to him their proprietary ...rs over the gardens, the produce, and the ...gement thereof.

...ter much consideration I feel myself ...ly unable to take this view. I do not ...ive in the just-quoted passage any ...ation that the defendants intended by ...contract to do more in this respect than ...itute Carter the managing partner of the ...ership-concern. I completely fail to ... therein any intention to impart to ...r proprietary powers in excess of those, ...ever they may be, which managing part... or agents, in a concern of this kind, usually ...ss. By the force of this passage alone, ...r only became managing partner. As ... his power to bind his co-partners ...nded solely upon that portion of the law of ...ipal and agent which Lord Wensleydale ...nest *vs.* Nicolls, 3 J., N. S., 923, expressed ...: "Each member of a complete partner...p is liable for himself, and, as agent for ...rest, binds them upon all contracts made ...the course of the ordinary scope of the ...rtnership-business." And, indeed, it seems ...me that the surrounding circumstances, ... certain occurrences which took place ...sequently to the making of the contract. ... to exclude the supposition that the ...ndants did confer upon Carter any special ...rs over their property. At the very ... when the agreement was executed, Carter ..., to the knowledge of the defendants, just ...to start for Europe; he did, thereupon, ...Europe, and thus, at the commencement ...his partnership-undertaking, the manage...nt of the concern, such as it then was, fell ...the hands of the defendants, and until ...turn of Carter they carried it on them...s, using their own name, so far as any ... was used at all; not his. This fact alone seems to me to militate irresistibly against the hypothesis that the defendants, in their arrangement with Carter, handed over this business to him in any special way, and gave him any special proprietary powers. Then, again, it was stipulated that "proper books of account should be kept in Calcutta, and should remain at the office for the time being of Messrs. Thacker, Spink, & Co." And I infer from the evidence that, for the first few years, these books were kept at the office of Messrs. Thacker, Spink, & Co., though they were afterwards kept at Carter's own office. It was not till 1865 that the gardens began to bear; and in that year the produce was insignificant. In the following years it increased. The tea produced in 1866, 1867, and 1868 was part sold in Calcutta, and part in England; the part which was sold in England was consigned to Thacker & Co., London. After the commencement of 1869, at the suggestion of Carter, the tea was all sold in Calcutta. Carter communicated with the salesmen in Calcutta in his own name only, and consequently the account-sales were rendered by them to him alone. It has before been mentioned that of such among these as suited his purpose he made copies, substituting therein for his own name the words "the owners of the Laojan and Namtee Tea Gardens," and these he forwarded to Mr. Thacker in England. But Mr. Thacker, in the belief that these were originals, immediately wrote out, objecting that this was not sufficiently specific, and insisting that the account-sales should always be rendered by the salesmen to the defendants by name.

It is true that Mr. Thacker did not take steps for the purpose of giving immediate notice to the salesmen themselves. But there was no occasion, I think, for his doing this. He was totally unaware that they were dealing with Carter in his own name, and had no reason to suppose that the use of the designation "owners of the Laojan and Namtee Tea Gardens" would mislead dealers into treating Carter as sole owner. In other words, then, upon the first intimation reaching Mr. Thacker that the actual names of the partners were not being used in the only transaction which the partnership had yet done to his knowledge before the mercantile world, he directed that this deviation from exactness should be corrected; and he had no cause to do more. And this again seems to me inconsistent with the supposition that the defendants had, ever at any time, intended to leave the business to Carter to be conducted by him in any degree as his own.

Lastly, we see that, in the Directory of the year 1866, *i. e.*, just as the gardens were beginning to produce tea, and the partnership therefore about to have dealings with the outside world, the defendants published the names of the partners in the concern, and the exact nature of Carter's position in it. For the moment it is not a question, how far this was effectual as a publication. It is here valuable, because it serves in some measure to indicate the view of the contract which the parties thereto themselves took. From the date of the contract until the end of 1865, the partnership-business had involved nothing but the actual manual clearance and cultivation of the gardens: and for that work the defendants had supplied the whole of the necessary funds. The concerns, therefore, could not well have come before the world in any way. It was now just entering the tea-market, and accordingly the defendants took the step of publishing the names of the partners. It is not suggested that either this or the matter of the name on the account-sales occurred as the result of an after-thought, or as the consequence of any change in the relations between the defendants and Carter. And I must confess that the effect of these facts upon my mind, notwithstanding the extent to which Carter did unquestionably use his own name without interference from the defendants, is to satisfy me that the arrangements made between the defendants and Carter for the management of the business by him did not place Carter in any exceptional or extraordinary position relative to the business, or confer upon him any powers of dealing with the partnership-property not usually enjoyed by the managing partner or agent in similar concerns.

We come then to the question which forms the latter part of the second ground above set out—was Carter's position as manager of this business such as, in the ordinary practice prevailing with respect to the conduct of similar concerns, carried with it the power as against his partners to hypothecate a future or expected season's crop of tea, not being tea actually existing, or in his personal possession, whether actual or constructive? It is, I think, a very significant circumstance in this case that there is absolutely no evidence to support the affirmative of this question. There is nothing in the evidence to suggest even that the person appointed by the owners to manage a concern of this kind obtained by recognized usage the power of hypothecating the future produce of the gardens at his discretion. No doubt, the evidence is amply suffi to show that it is matter of most com practice that the future or forthcoming duce of a garden should be hypothecate secure the advance of the money needed the expenses of cultivation, and that a recognized branch of a capitalist's b ness to advance money on this footing; no witness ventures to say, supposing a cern to be managed by an agent on beha the proprietors, that, in the event of hypothecation being made, it is the mana agent of the proprietors alone who m effects it, at his own discretion, in the o nary course of business, without spe authority for the purpose. On the o hand, several expert witnesses expressly they would never themselves advance m upon an hypothecation of this kind, a hands of an agent, without first satisfy themselves that the agent possessed power to hypothecate; and I do not un stand that the plaintiffs have ever seriou contended that there is a usage of trade g to this extent: indeed, the learned Co for the plaintiffs, during the argum admitted his own conviction that, if his cli had known that Carter was not sole ow they would not have accepted his hypo cation without inquiring as to his auth to make it. It seems that in the C below some reference was made to the of the consignee of a West Indian E for the purpose of leading up by analo the probable rights of one who stood in position of the plaintiffs, relative to defendants in the present matter. But question before us is not so much, what the rights of the plaintiffs if they are to treated as consignees of the defendi estate, as whether Carter had authority place them in the situation of such c signees. It appears to me that the plain have failed to make out that Carter had authority.

If then the plaintiffs can succeed in suit, it must be upon the third of the al mentioned grounds. The principal f bearing on this point are that at first C was sole owner of the gardens; that defendants then by their agreement Carter gave him full power "to manage matters and affairs of the estate," and ted to prescribe the name or style u which this should be done; that, in course of this management, he used his name only, as for instance in consig produce for sale, and in all necessary cor spondence; that the chests of tea, w

f

…down from the gardens were addressed …name alone, or marked with his ini… and that the money required at the …ns, then not sent in the shape of …ry-drafts, was habitually obtained by …arden-managers through the means of …drawn upon Carter personally, and …tiated by the managers or the payee. …not said that the defendants, at any time, …that Carter was representing himself …le owner of the gardens, but it is in …urged on the part of the plaintiffs that, …uch as the defendants did not take all …are which they might have taken, in …of these instances, to ensure that Car… name should appear with the qualifi…n of agent, they must be taken to have …ented to his holding himself out to the …as sole owner of these gardens. It …tain, however, as I think I have shown, …the defendants did not really consent to …r holding himself out as sole owner …e concern; on the contrary, that they …lly objected to anything occurring …h might have the effect of obscuring …true owners. It was on this account …Carter felt himself obliged to conceal …them the fact (necessarily incidental …e course of fraud upon which he had …rked) that the account-sales of the teas …to him addressed, and rendered to him… personally; and in the pretented origi…which he furnished to the defendants, …bstituted for his own name the general …"owners of the Laojan and Namtee …Gardens;" but the defendants were not …satisfied with this, and insisted that the …nt should be rendered by the salesmen …hey supposed) through Carter to them …eir business-names. It has already been …tioned that the defendants also every …r, beginning at the end of 1865, published …their Directory an accurate description of …proprietors of these gardens, and of the …ct position occupied by Carter; and it …ot an altogether unimportant fact that the …intiffs have in use on their business-book…f, several numbers of this Directory …taining this information. I must add …there has been no imputation whatever …e upon the defendants' sincerity of pur…e and action throughout this matter. It …has seen, as I think, beyond all doubt, …n the defendants were all along, as a …r of fact, opposed to Carter's assuming …character of sole owner of the gardens; …then, are they to be taken in this suit …having consented to, or connived at, …er's representing himself, directly or indirectly, to the plaintiffs as such sole owner? It is not pretented that they made on their own part any positive representation to the plaintiffs either by word or act. The reason if any, must be that they neglected to do something, or omitted to take some precaution which the plaintiffs had a right to expect that the actual owners of gardens, situated as the defendants were relative to Carter, would do or take as against their managing agent. And the burden of showing that this was the case unquestionably rests on the plaintiffs.

But the plaintiffs have done nothing towards showing this. Probably, most concerns of this kind are managed by an agent, and not by the actual owners, or, at any rate, not by all of them; and we can imagine it to be usual that, in such cases, the agent character of the manager should be, in some way, manifested at his office, that he should sign his business-letters as agent; that the garden-managers should, in their communications with him, designate him as agent; that the produce should be consigned to him as agent, and so on. But, on the other hand, we can also imagine it a common practice that the agent should, in these matters, or most of them, use his own name. And we have literally no evidence whatever before us sufficient to enable us to judge what is the practice which really prevails in these respects. Mr. Murdoch does not specify any particular shortcoming on the part of the defendants as that which misled him, or materially contributed to mislead him. He did not deal with, or even know, Carter at the time when he alone was proprietor of the gardens. He is unable, and he does not pretend, to make it a ground of complaint that the defendants did not give notice of the change of proprietorship to Carter's old clients. He cannot, in any degree, avail himself of the force of the illustration given by Mr. Baron Parke in Freeman *vs.* Cooke, namely, "a retiring partner omitting to inform "his customers of the *fact* in the usual mode "that the continuing partners were no longer "authorized to act as his agents is bound by "all contracts made by them with third per"sons on the *faith* of their being so author"ized." As has been before remarked, the plaintiffs do not suggest that the defendants ever made any positive misleading representation to them. Their case seems to be simply this, namely, that the defendants, by general negligence, want of care, and of supervision in the matter, afforded Carter the opportunity of holding himself out to

the mercantile world as sole owner of the gardens, and that they are therefore bound by that which he, availing himself of the opportunity, has done in that character with respect to their property. But this position is not, I think, tenable. The principle of the decision in Pickard *vs.* Sears (6 A. and E. 474), as enunciated by Mr. Baron Parke in Freeman *vs.* Cooke (2 Ex. 663), is that "if, whatever a man's real intention may be" (*i. e.*, in regard to making a representation of fact), "he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be concluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect." And Mr Justice Blackburn, in Swan *vs.* North British, &c., Australasia Company, said that the neglect which is to give rise to the estoppel "must be in the transaction itself, and be the proximate cause of leading the party into the mistake;" also, "it must be the neglect of some duty that is owing to the person led into that belief, or what comes to the same thing to the general public of whom the person is one; and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy." The plaintiffs have failed to point out any conduct on the part of the defendants which was the natural and proximate cause of their being led into the belief that Carter was sole owner of the gardens, and that they might safely deal with him as such. At most they have shown that, if the defendants had exercised a stricter supervision over Carter's proceedings than they did, they might have put it out of his power to commit the fraud which he did commit. But the decision of the Exchequer Chamber in Swan *vs.* North British Australasia, &c., is authority for saying that it is not enough, as between two innocent persons, in order to cast the loss occasioned by the fraud of a third person upon the one rather than upon the other, to show that the first, by his imprudence and want of care over his own property, enabled the fraud to be committed.

The cases in equity which bear upon this point seem to deal with the matter in a slightly different manner, but the result arrived at in them is substantially the same as in those just quoted. In Evans *vs.* [illegible] nell (6 Ves. 174), the Lord Chancellor (E[illegible] discussed a question of this kind at con[illegible] able length, and under several aspects. [illegible] a husband, having by deceit obtained [illegible] his wife's trustee the title-deeds of the [illegible] property, mortgaged the property to a stra[illegible] for an advance of money to himself. [illegible] bill sought to establish the mortgage, [illegible] to make the trustee liable for the defici[illegible] In delivering judgment, the Lord Chan[illegible] said: "The question in this cause is wh[illegible] upon the doctrine of this Court, the de[illegible] ant Bicknell (the trustee) is liable to [illegible] good the deficiency to the plaintiff upo[illegible] transaction beyond the value of Stan[illegible] (the husband's) interest under the settle[illegible] which would be the first to be applied. [illegible] bill contended at first that this was a gross[illegible] on the part of the wife; that she was [illegible] to all the circumstances under which [illegible] husband obtained the loan, and gave po[illegible] encouragement to the party lending[illegible] allegation which, if made out, would [illegible] sufficient to postpone her to the mortga[illegible] because coverture is no excuse for fr[illegible] Upon her answer, however, and the evide[illegible] it is not now, nor can it be, contended [illegible] there was, upon her part, either *distinct fr*[illegible] or that *gross degree of negligence* w[illegible] this Court looks at *as fraud with regar*[illegible] *the consequences attaching to it.* Th[illegible] fore her estate, so far as depends upon [illegible] own act, appears secure." Again, late[illegible] the same judgment appears this passa[illegible] "All these cases, either of positive re[illegible] sentation contrary to the truth, or conc[illegible] ment of what ought to have been represen[illegible] are intelligible; but it is not to be de[illegible] that, where there has been mere negligen[illegible] though it may have very mischievous c[illegible] sequences, the Court has not charged [illegible] party unless it has been so gross as to *amo*[illegible] *to evidence of fraud.*" Thus we find [illegible] Lord Chancellor classing the mater[illegible] which would furnish an estoppel to prev[illegible] the real owner of property from averring [illegible] truth with regard to the non-transfer of [illegible] property, under three heads, namely, act[illegible] representation by him contrary to that tru[illegible] concealment by him of what he ought [illegible] have represented with regard to it; [illegible] negligence in the matter so gross as [illegible] amount to evidence of fraud. Also, [illegible] Lord Chancellor added that, "if the intenti[illegible] is fraudulent in any respect, though [illegible] pointed exactly to the object accomplish[illegible] yet he will be bound." The doctrines [illegible] the Court of Chancery in England w[illegible]

h

d to the constructive notice which will
purchaser of property with a trust,
so perhaps pertinent to this case,
se it is maintained on behalf of the
iffs, apparently with the approbation
Justice Macpherson, that, inasmuch
defendants might, by the exercise
most ordinary caution and care, have
themselves acquainted with Carter's
, they must therefore be made respon-
for the consequences of them. But it
rs to be well settled that simple negli-
and abstaining from inquiry is not
h; "there must be a degree of negli-
so gross that a Court of Justice may
it as evidence of fraud" (per Vice-
cellor Wigram in West *vs.* Read, 2 Ha.

is, I think in this case, beyond all
ion that the defendants did not make
positive representation to anybody
lated to give rise to the belief that
r had power to hypothecate the season's
and that they did not keep back from
one anything in the shape of informa-
to the contrary which they were under
obligation to disclose. The plaintiffs
therefore driven to rely upon the
dants' negligence and want of care
y. But it is impossible, as it seems to
n the admitted facts, to contend that the
gence and want of care apparent on the
of the defendants was of such a character
afford evidence of fraud.

n the whole, then, I have experienced no
antial difficulty in coming to the con-
on that the plaintiffs have failed to make
hat the defendants are liable to make
Carter's contract of hypothecation.

has, however, been argued that, even if
be so, still the defendants are bound by
contracts exhibited in the bills of
hange which Carter drew on the plaint-
these contracts are subsidiary, so to
k, to the larger contract of hypotheca-
and it would be strange if they could
nforced against the defendants when the
cipal contract could not be. But all
estion, even on this head, is, I think, set at
by reason of the non-establishment of
first ground before mentioned. Carter
s no more the agent of the defendants in
awing these bills than he was in the matter
the principal contract.

I am therefore of opinion that the plaintiffs
ve, in all respects, failed to establish the
im which they make against the defend-
nts, and that this suit ought to be dismissed.

I regret exceedingly to find that, in taking this view, I have the misfortune to differ from the learned Chief Justice. This judgment was arrived at by me, and written out some months ago, when the facts of the case and the arguments of Counsel were fresh in my memory, and I have had no leisure since for revising it. I am not precisely informed as to the ground upon which the Chief Justice places his decision, but the more prolonged consideration which I know he has been able to give to the matter, of itself, apart from other reasons, serves to invest his opinion with the greater weight as compared with mine; and the additional fact, that he concurs with Mr. Justice Macpherson, necessarily leads me to distrust very much my own conclusions where they are opposed to his. It is, under these circumstances, great satisfaction to me to know that my opinion, whichever way it lies, cannot materially affect the result of this suit as between the parties.

Couch, C.J.—By an agreement made on the 22nd day of July 1862 between Thomas Emerson Carter and William Thacker, since deceased, and the defendants George Parbury and William Spink, Carter agreed to sell, and Thacker, Parbury, and Spink agreed to purchase, "one equal half part in the lands, tea-plantations, and estate situate in the province of Assam, the property of the said T. E. Carter, then in his possession, and for grants of which he had applied to the Indian Government, and which were known respectively as the Laojan Tea Estates and Grants of land."

The agreement contained the following clauses:—

"*2nd.*—The price of the said shares shall be the aggregate amount of all sums expended by the said Thomas Emerson Carter upon the said lands or any of them up to the date hereof, and, upon such amount being ascertained, the same shall be paid to the said Thomas Emerson Carter by bills on London drawn at the current exchange of the day by the firm of Thacker, Spink, & Co. of Calcutta or W. Thacker & Co. of London, payable three months after sight.

"*3rd.*—The price so paid shall stand in the books and accounts of the estates as a charge thereon, bearing interest at 5 per cent. per annum, and shall be paid to the said William Thacker, George Parbury, and William Spink, out of the produce of the said estates before any division of the profits or gains thereof.

"*4th.*—The said William Thacker, George Parbury, and William Spink shall provide all funds necessary for cultivating, clearing, and

carrying on the said lands and plantations which shall bear the like interest, and be repayable in like manner as is stipulated in respect of the money mentioned in the third clause.

"*5th.*—Whilst in Calcutta, or within the province of Bengal, the said Thomas Emerson Carter shall conduct and manage all matters and affairs of the said estates, subject, nevertheless, to the assent and approval of the said William Thacker, George Parbury, and William Spink.

"*6th.*—Subject to the payments referred to in clauses 3 and 4 of these presents, the gains and profits of the said estates shall be divided yearly as soon as the accounts of each season can be conveniently closed, in the following proportions, that is to say, one-half to the said Thomas Emerson Carter, and the other half to the said William Thacker, George Parbury, and William Spink.

"*7th.*—The said Thomas Emerson Carter shall, when called upon to do so, convey the moiety of the said William Thacker, George Parbury, and William Spink to them, their heirs and assigns, in such manner as they shall require, they paying all charges attending the same."

"*11th.*—Proper books of account shall be kept in Calcutta, and be, at all times, open to the inspection of the parties hereto at reasonable hours in the daytime. and that such books shall remain at the office for the time being of Messrs. Thacker, Spink, & Co."

Thus the agreement provided that Carter was to conduct and manage all matters and affairs of the estates. Nothing is said as to its being done in his own name or in that of the partners, or of any firm.

The manner in which the business was conducted is stated by the defendant Mr. Spink, who was examined as a witness.

He said: "About July..1862, I first heard of the Laojan Tea Company. Mr. Carter was going to England, and offered me a share in it if I found money to carry it on. I agreed subject to sanction of my partners. The terms were in writing. This is it, No. 25. It is signed by Carter and by myself. It was subject to his getting approval of my partners at home. He did get it. If they had not agreed, I would have taken the share for myself. He had spent about Rs. 5,900 in the concern. It was paid him in England by my partners Parbury and Thacker. We have advanced every shilling from that time to the present. We have advanced about 4½ lakhs now by a rough guess, the balance against the gardens, after allowing for [illegible] we have received. We used to fur[illegible] Carter with accounts of the sums adva[illegible] We used to send them to Carter at the e[illegible] the month, and again at the end of the q[illegible] ter another account. They were signed Mr. Carter and myself, and sent to Engla[illegible] This is one (Y) to 22nd September 18[illegible] and shows a balance of Rs. 3,43,620-5[illegible] It is dated 31st October 1871. This [illegible] amongst the books handed by Behrend[illegible] Mr. Brown. It is signed by Carter. I h[illegible] had an account made of the total amo[illegible] advanced to Carter to the day he went a[illegible] This is a correct account (26). This is [illegible] account to end of May. It shows e[illegible] thing received as well as paid (No. [illegible] The tea received since Carter's death [illegible] been shipped to England. No accou[illegible] have been received. They will amount [illegible] £3.000. Carter went two or three times [illegible] England for short trips. Thacker, Spink, [illegible] Co. managed. None of my partners h[illegible] been out here since 1862. While Carter [illegible] away, we managed. I was sole partner he[illegible] but I was in England with Carter in 18[illegible] and 1867. Mr. Barham managed the[illegible] On the last occasion, when I went hom[illegible] Mr. Brown managed for me. Brown a[illegible] Barham made the remittances while I w[illegible] away. When Mr. Carter was here, we ma[illegible] remittances through him. He told me t[illegible] sums he required to send to the gardens, a[illegible] I used to get treasury-drafts. We used [illegible] give him the drafts for the amounts wante[illegible] Sometimes we could not get treasury-draft[illegible] and, when the managers ran short, they dre[illegible] bills, which we paid. The managers at th[illegible] gardens drew on us when Carter was away[illegible] or, when he was here, they drew on him[illegible] We used to give a cheque. Carter used t[illegible] send his man with a note: "My dear Spink,—[illegible] Give me a cheque for amount of bill falling[illegible] due to-day." I gave the cheque, and have[illegible] paid other bills Carter used to send to us, and[illegible] we paid with reference to the particular bills[illegible] A payment on account of No. 22, we put[illegible] down as paid on account of tea-gardens to[illegible] the man who received the money. They[illegible] were presented by native bankers. We put[illegible] down bill favouring so and so. Mr. Carter[illegible] took contracts for supply of tea-chests, and,[illegible] when he wanted money, he sent to us for it.[illegible] He sometimes mentioned the number of[illegible] chests. In March 1872, I sent him an[illegible] advance of Rs. 1,000 to pay for tea-chests.[illegible] In 1866 the gardens began to bear; perhaps[illegible] a little in 1865, not worth mentioning. In[illegible] 1867 and 1868 they were better. The tea,[illegible]

5 to 1868, was partly sold in Calcutta and
ly sent to England. I cannot say when
as sold in Calcutta. After beginning of
9 it was all sold in Calcutta. We had
n sending home, and Carter recom-
ded from beginning of 1869 it should
old in Calcutta. He represented it sold
nas a pound better in Calcutta. He
so for some time. We did not accede
the beginning of 1869. Mr. Carter
home account-sales of tea of 1869
1870. The originals did not pass
ugh my hands. He used to write long
s to Mr. Thacker sending home the
unt-sales. I read and forwarded them.
lon't remember ever inspecting the
unt-books. He always said they were
ished; he was waiting returns from the
ens to get them finished. Mr. Thacker
e to Carter, as the real owners were
cker, Spink, & Co., the accounts should
n their names. I had not the slightest
the teas were being sold by Moran and
well on account of T. E. Carter, Esq.
(28a) is the letter. Subsequently they
all sent home on account of Thacker,
k, & Co. On my return here at end of
ember 1872, I became aware they were
g sold on account of T. E. Carter, Esq.
ever had the slightest suspicion that
nces were made on tea of ours being
ged. I never gave him authority to do
My firm has never refused to meet any
lities of the garden; we paid them
diately. This (29a) is Carter's reply
8a. It is dated 2nd September 1869.
m that date all future account-sales were
ered in name of Thacker, Spink, & Co.
managers at the gardens pay them-
es from money remitted, and send us
unts. Lawrie is our present manager.
draws his salary out of money remitted
im. At one time we paid Rs. 200. We
pay Rs. 300 a month to his private
nts, Balmer, Lawrie, & Co. We paid
m a part of his salary. "Pay Thacker,
k, & Co." is our writing. They were
le out against Carter, and paid by us.
er sent them on. We ordered payment,
they were paid in our office (30). We
memos. with the drafts; 31 is one of
m in Mr. Lawrie's handwriting. Some-
s they came with such a memo., at
rs with a letter from Carter."

Mr. Brown, who had charge of the busi-
of Thacker, Spink, & Co. during Mr.
k's absence, said: "Mr. Carter had the
agement of the Laojan Tea Company.
simply furnished the money as Carter
required it. There was no particular difference between 1869 and 1872. Mr. Carter would say he wanted money on a particular date, and it was generally paid to Mr. Carter. In one or two instances the money was not paid to him. Thacker, Spink, & Co.'s cheques were paid to Mr. Carter for the Laojan Gardens. On one or two occasions we paid the party. I never refused anything Carter wanted. He always had everything he asked for. I never knew till September 1872 he was getting advances. I first heard it from Mr. Gray, and half-an-hour after from Mr. Murdoch. I went to Mr. Murdoch who explained matters to me, showed me Carter's letters, sent for his firm books, and read to me the amount Carter had received. I believe I told him the firm had no knowledge anything of the kind had occurred. Mr. Behrends acted after Mr. Carter's departure in July. I wrote and demanded all the papers. I had to wait some time before I got them Things went on in precisely the same manner after Carter's departure. I never refused Behrends any money he wanted for the estates. Certainly not. Occasionally a draft from Assam would be sent with a chit from Carter by a man of one of the banks. In every case, communication was made by Carter before payments were made."

It appears to me to be a most material circumstance that the bills, by means of which the local manager at the tea-gardens obtained money when he required it, were drawn upon Carter in the same manner as if he had been the sole owner, and that Mr. Lawrie, the manager, drew his salary in the same way. The defendants were fully aware of this, and found the money to meet these bills and drafts. And this mode of dealing continued down to the time of the transaction which is the subject of this suit.

The sales of tea in Calcutta were made by the brokers on Carter's account only, and the account-sales were made out in his name. Mr. Spink said that Mr. Thacker wrote to Carter that, as the real owners were Thacker, Spink, & Co., the accounts should go in their names.

It appears from the evidence of Mr. Lewis that Carter met this request by manufacturing account-sales from those which were furnished to him by the brokers, and subsequently all the account-sales were sent home on account of Thacker, Spink, & Co. But Mr. Thacker's letter to Carter shows that he knew that Carter had been having the tea sold in his own name. The account-sales were sent

home to Mr. Thacker by Mr. Spink, but, as he said he had not the slightest idea that the teas were being sold on account of Carter, he probably did not examine them. In fact, he, as he said, placed the utmost confidence in Carter, who was his son-in-law, and nothing was done by the defendants to learn whether the teas continued to be sold on Carter's account.

The only act in the way of notice to the public which the defendants attempted to prove was a notification in a Directory published by them in Calcutta (Thacker, Spink, & Co. being booksellers and publishers).

In the Directory for 1870, in the list of tea-estates, there is the Laojan Tea Estate, and proprietors, T. E. Carter, Thacker, Parbury, and Spink. Mr. Murdoch, one of the plaintiffs, said: "I don't look into Thacker's list unless I have occasion. I know there is such a list. That is my copy. It was in my firm. I have examined it since this suit. I see the Laojan and Namtee Company is in the list. The indigo I look after in the same way. I don't refer to these. We know it all. We have no occasion to apply to Thacker's Directory."

In the Directory for 1870 and for 1872, Carter is also described as Calcutta agent.

Assuming that the plaintiffs knew what was in this Directory, I think it cannot be considered as a notice to them that the authority which Carter had been exercising, and which he continued to exercise with, so far as it related to the bills drawn by the local manager, and the drafts for his salary, the knowledge of his partners, had been determined; and that he had only the authority of an ordinary Calcutta agent. If it is usual for the local manager to draw upon the agents in their own names as if they were the owners, the defendants might have proved it. The plaintiffs were not bound to prove the contrary.

This was the state of things when the agreement upon which this suit is brought was made. Mr. Murdoch's evidence about it is as follows:—

I dealt with Carter as owner till his death. I received no notice from any one that he was not owner. I received D from Mr. Carter; also E F is the press-copy of the letter written by our firm to T. E Carter. This was sent with the letter. We afterwards received it back from Mr. Carter. It is signed by him. Until recently it bore a one-rupee stamp; now similar documents bear a two-rupees stamp as an assignment (G). These account-sales were rendered by me to Mr. Carter for season 1871-72 (H [illegible] They are signed by Mr. Davidson. T[illegible] were rendered in ordinary course of busin[illegible] Mr. Carter never complained of their corr[illegible] ness."

The papers referred to are the two let[illegible] which have been read by Mr. Justice Ph[illegible] and which I therefore need not read ag[illegible] and the paper which is the foundation of [illegible] suit. It reads thus: "In conformity [illegible] the tenor of a letter received from Will[illegible] Moran & Co., dated the 9th day of F[illegible] ruary, and pursuant to directions recei[illegible] from William Moran & Co., I do her[illegible] certify and declare that I will hold the en[illegible] quantity of tea to be made this season [illegible] the Laojan and Namtee Tea Gardens [illegible] Assam as the property and at the dispo[illegible] of William Moran & Co., for and on be[illegible] of the said William Moran & Co., and t[illegible] I hereby undertake to continue so to h[illegible] the above tea for the sole use and dispo[illegible] of the said William Moran & Co., or at [illegible] order and direction of the said Will[illegible] Moran & Co, and to consign it at the us[illegible] period, or when required, under invo[illegible] addressed to the said William Moran & C[illegible] or to their order dated at Calcutta."

In another part of his evidence, Mr. M[illegible] doch said: "In all the transactions I h[illegible] with Carter, I believed him to be owner [illegible] this property, and made advances to him [illegible] owner; to him personally. He was the o[illegible] person to whom we gave credit. Mr. Cre[illegible] well told me he thought Mr. Carter h[illegible] treated him badly, but what his reasons w[illegible] I don't remember. All the advances I ma[illegible] to Carter were made on bills of exchan[illegible] G was a collateral security for those bil[illegible] We frequently get such documents. It [illegible] not our practice to get instructions to t[illegible] manager at the gardens. Mr. Carter shou[illegible] have addressed this to his manager, w[illegible] should have signed it. I intended Mr. Cart[illegible] to sign one, and his manager the other. [illegible] intended Carter to sign the one he signe[illegible] and we filled up" (this was with referenc[illegible] to some questions which were put to hi[illegible] about the paper not having been signed b[illegible] the manager of the tea-gardens). "Th[illegible] one he signed should have been signed b[illegible] his manager at the tea-gardens. Mr. Carte[illegible] objected to sign anything as the letter[illegible] show; but subsequently signed that one (G). [illegible] I presume he objected to sign anything [illegible] that would go to his manager. I presume s[illegible] now; but did not do so then. I have ha[illegible] many instances similar to this. I really did[illegible] not attach much importance to it, as I thoug[illegible]

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as dealing with an honourable man. I did attach much importance to his assignt. I wanted some document. If I sted on it, I would have had both signed. anted some security. He gave no reason ept what is set out in his letter (X). ordinary course the two letters should signed. Sometimes we have it one way, metimes the other. The ordinary course hat both should be signed. It is generally e." Up to that time I had not had such a ument from him. On previous occasions, as when tea was made and coming down e. It was before any tea was made. I uld have given money if he had not signed. bought Carter was an honourable man, and t, if he engaged to hold 1,000 maunds tea at my disposal, he would do so. I de no inquiries at all about Carter. On own statement I thought him sufficiently vent and honourable to make advances to.

* * * * *

a often comes without the bills. We give demnity. Sometimes we make advances bills, and sometimes without, just as its the convenience of the borrower. The ost usual way is by drafts. We generally ve an assignment. In the middle of the teaason, we advance on bills of lading, or if we now the parties, they say they will send us much tea. I call that trusting to their onour. Our firm does not make advances ithout covering or expectation thereof. I ver intended to advance the money to rter without expectation of tea of Laojan rdens. I never heard anything to lead e to suppose Carter wanted the money cept for legitimate purposes of his garden. ost decidedly we would not make advances r speculations. We only make advances n produce received for sale. It is usual for oduce of tea-gardens to be hypothecated, lso of indigo-concerns. We have carried on both indigo-concerns and tea-gardens. There is nothing in their produce being pledged to put us on inquiry."

It appears to me that the question in the case is whether this transaction was within the scope of the authority which Carter had, or was allowed by his partners to appear to have, in managing and conducting the affairs and business of the partnership. The agreement, I think, impliedly authorized him to conduct and manage the matters and affairs of the estates in his own name, and as if he were the owner. It was to be subject to the assent and approval of his co-partners; but the public would have no notice of this, and the persons dealing with him would not be bound to ascertain whether what he was doing was assented to by his partners. There was no provision that the business of the cultivation of the tea-gardens and disposal of the produce should be carried on in their names or in the name of a firm, so that the public would have notice that Carter was not the sole owner. Considering the confidence which Mr. Spink placed in Carter, and the manner in which Carter conducted the business from the first, I think it is most probable that it was the intention of all parties that Carter should continue to conduct and manage the affairs and business of the tea-gardens as if he had not parted with the half share, and had continued to be the sole owner.

It does not appear to me that there is any question here of negligence to which the argument before us was partly directed. It is a question of actual or apparent authority, and whether the transaction was one which the owner of a tea-garden carrying on the cultivation of it would, in the ordinary course of business, enter into. I think Carter had authority to do anything which an owner and cultivator of a tea-garden would do in the ordinary course of business. And certainly, if the authority was not actually given to him, he was allowed by his co-partners to act as if he had it.

Then the only question is whether this transaction was in the ordinary course of business. This is a question of fact to be decided according to the evidence.

In Dickenson *vs.* Valpy, there was no evidence of usage, and in the absence of it the Court could not say that it was necessary for the purposes of farming to draw bills of exchange.

Now, as to the course of business, we have not only the evidence of Mr. Murdoch, but also that of Mr. Williamson, one of the defendants' witnesses. It was not suggested to us that Mr. Murdoch acted in any way in bad faith, or not in the course of his business. It is evident that he considered the transaction as an ordinary one, and at the close of his evidence he said: "It is usual for produce of tea-gardens to be hypothecated, also of indigo-concerns. We have carried on both indigo-concerns and tea-gardens. There is nothing in their produce being pledged to put us on inquiry."

Mr. Williamson, a member of a firm of tea-agents, said: "I have never known a private tea-concern to borrow money against produce. I have known no one having a share only do so. I have known the power

conveyed by power-of-attorney. It forms a necessary part of tea-business if you want to raise the money. A sole partner can do it, but no one else, unless empowered by power-of-attorney. That is my opinion after 20 years' experience. *** It is a very usual thing with private tea-companies to do so, if they want money. It is very frequently done."

It is clear to my mind upon this evidence that the transaction would have been according to usage if Carter had been the sole owner of the tea-gardens, and the defendants, by allowing Carter to manage them ostensibly as sole owner, clothed him with every authority which was incidental to a sole owner in that business.

In Pickering *vs.* Busk, 15 East. 43, Lord Ellenborough says: "Strangers can only look to the acts of the parties and to the external indicia of the property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority." And it was held in Freeman *vs.* Loder, 11 A. and E. 592, that, if a person is trading in his own name as the agent of another with his knowledge and authority, his contracts are binding upon the person for whom he is trading, until the latter gives notice to the world that he has revoked the power to act for him.

On the above grounds, I think that the defendants were bound by the agreement of the 9th of February 1872, and that the decision by Mr. Justice Macpherson ought to be affirmed, and the appeal dismissed; but, as my learned colleague is of a different opinion, I think it should be without costs.

The 4th December 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Toda Giras Haks—Immoveable Property—Limitation—Act XIV. of 1859, s. 1, cls. 12 & 16.

On Appeal from the High Court of Judicature at Bombay.

Maharana Futtehsangji Jaswantsangji

versus

Dessai Kullianraiji Hekoomutraiji.

In a suit to establish plaintiff's right to a toda giras hak upon defendant's inam village, and to recover arrears due in respect of that hak, the substantial question was whether the suit being for the recovery of "interest in immoveable property" fell within the 12th clause of the 1st section of Act XIV. of 1859, or was to be governed by the 16th clause:

HELD that the determination of the question depended upon the general construction to be given to the terms "immoveable property" and "interest in immoveable property" as used by the Indian Legislature; and that the term "immoveable property" comprehends all that would be real property according to English Law, and possibly more:

HELD further that, whatever may have been the origin of the hak, it must be assumed to be now a right to receive an annual payment which has a legal foundation and of which the enjoyment is hereditary, and that the liability to make the payment is not personal but attaches to the inamdar *virtute tenuræ*.

HELD accordingly that the interest of the hakdar was an "interest in immoveable property" within the meaning of Act XIV. of 1859, and that the suit was to be governed by the limitation of 2 years provided by the clause 12th of section 1.

THE suit which has given rise to the appeal was brought by the appellant in January 1865, against the respondent, to establish the right of the former to a toda giras hak upon the inam village of the latter, and to recover the arrears due in respect of that hak, for the seven years preceding the commencement of the suit. The annual amount alleged to be payable by the respondent to the appellant is 501 rupees, though it may be questionable on the evidence whether this sum is the gross amount of the hak, or the net balance after deducting certain small payments and allowances to other persons which are entered in the accounts.

The respondent admitted, as his father in other proceedings had admitted, the existence of the hak, and that it had been paid by the inamdars of the village up to the Samvat year 1914 (corresponding with 1857-58), but contended that his father had then properly exercised a right to put an end to it; and, further, that the present suit was barred by the law of limitation.

The issues settled are at page 20 of the Record; but the only one which is to be considered on this appeal is whether the claim is within the appropriate period of limitation or not. Of the remaining issues, one, which is no longer treated as material, was disposed of in the appellant's favour, and the others have not been tried.

The substantial question considered in the Court below was, whether the suit, being one for the recovery of an "interest in immoveable property," fell within the 12th, or was to be governed by the 16th, clause of the 1st section of Act XIV. of 1859. In the former case, the period of limitation would be twelve years, and the suit would be

ught in time; in the latter case, the period limitation would be only six years, and suit would be barred.

The determination of this question involves consideration of the nature of a toda hak. A good deal of learning on this ject is to be found in the case of the lector of Surat *vs.* Pestonjee Rutonjee, Morris's Cases in the Suddur Dewanny wlut of Bombay (for 1855), p. 291, and e case of Sumbhoolall Girdhurlall *vs.* The lector of Surat, 8 Moore's I. A., p. 1, to ch their Lordships have been referred. y do not think it necessary to go at any th into this. It is sufficient to state that e annual payments, although originally ted by the Grasias from the village com- ities in certain territories in the west of ia by violence and wrong, and in the re of black-mail, had, when those terri- s fell under British rule, acquired by long e a *quasi*-legal character as customary al payments; that, as such, they were gnized by the British Government, which upon itself the payment of such of them ere previously payable by villages paying nue, and left the liability to pay such of as were payable by inam villages to fall the inamdar. And since the decision of before-mentioned case in the 8th volume of re, it cannot be questioned that the toda haks of the former class constitute a gnized species of property capable of ation, and of seizure and sale under an cution. How far that decision may govern rights of an inamdar, and some of the tions raised by the untried issues in this their Lordships abstain from considering. the purpose of determining the question limitation, it must be assumed that the m of the appellant, if not barred, has a l foundation.

The question to which period of limitation e claims are subject has been the subject veral decisions in the Bombay Courts. The earliest of these being the case the Collector of Surat *vs.* Tejoobawa gwatsungji, which is set out at p. 67 of Record, does not materially affect the ent question. When that suit was menced, Act XIV. of 1859 had not e into operation; and, under the law in force (the Bombay Regulation V. of 7), the claim was subject only to the ve years' rule of limitation, whether a giras hak was in the nature of able or of immoveable property. It is that the High Court, in delivering its gment, intimated an opinion that, whatever might have been the original nature of that toda giras payment, its conversion into an annual payment out of the Government treasury, not secured or chargeable on any particular lands, had deprived it of the character of immoveable property, if it ever possessed that character. But it is obvious that this dictum has no application to a toda giras hak payable by an inamdar, in respect of which there has been no such conversion. The case of Furushram Nurbheram *vs.* Syud Hossein Wullud, which is set out at pp. 69 and 72 of the Record, is, however, in point. There the question arose between the purchaser of the Grasias' interest in a toda giras hak at an execution-sale, and an inamdar; and the law of limitation to be applied was Act XIV. of 1859. The Judge of Broach there held (and his decision was affirmed on appeal by the High Court) that the claim was clearly for a money-payment, and that the case must be decided by the 16th clause of the 1st section of the Statute.

The authority of this last case has been recognized, and its ruling adopted by each of the three judgments now under appeal.

The other decisions of the High Court of Bombay which have been cited are all distinguishable from the present.

That of the Collector of Surat *vs.* The Heiresses of Kirvabai, 2 Bombay High Court Reports 239, seems to their Lordships to have no bearing upon the question before them. The only questions raised in it were whether a toda giras hak was alienable, and whether, by reason of its falling within the definition of "land" contained in a particular statute (which it did not), the Court was deprived of jurisdiction. In the case of Baratsangji *vs.* Navanidaraya, 1 Bombay High Court Reports 186, as in that set forth at p. 67 of the Record, the law of limitation to be applied was the Bombay Regulation V. of 1827; and what the Court actually decided was that the right to the desaigiri allowance claimed would be barred, unless the plaintiff could establish the receipt of a payment on account of it within twelve years. The Court, no doubt, described the allowance claimed as "in the nature of one charged upon, or payable out of land." But whether it were so or not was not a point in issue. Again, in Raiji Manor's case, reported in 6 Bombay High Court Reports, p. 56, the Court, in ruling that the claim was barred by the six years' limitation, distinguished it from the last-mentioned case on the ground that it was a claim for a pagdi allowance, which was a mere money-payment

out of a desaigiri allowance, and not like the latter in any sense an interest in land. The same distinction may exist between a pagdi allowance and a toda giras hak.

The case of Krishnabhat Hiraganji, reported in 6 Bombay High Court Reports, p. 137, and that of Purshotam Sidheshvar, reported in 9 Bombay High Court Reports, p. 99, both relate to hereditary offices, and not to haks, and cannot, therefore, be regarded as directly in point, although the principles which they lay down for the construction of Act XIV. of 1859 are important, and will have to be considered hereafter. It is, however, to be remarked that, in the latter case, Chief Justice Westropp, at the close of his able and elaborate judgment, expressed a strong doubt of the soundness of the decisions which had ruled that claims for the toda giras haks were subject to the six years' rule of limitation. This being the state of the authorities at Bombay, their Lordships cannot think that there has been that long and consistent course of decisions which affords grounds for treating the question under consideration as concluded by authority, even in the Courts of India.

It has, however, been strongly urged on the part of the respondent that this appeal is to be determined by the authority of their Lordships' recent decision in the case of Desai Kullianrai Hakoomutrai (the present respondent) and the Government of Bombay, 14 Moore's I. A., p. 551. Their Lordships cannot accede to this argument.

In the case so relied upon, the question of limitation did not arise. It is, however, true that in deciding it the High Court of Bombay had held that the respondent had acquired a title, by positive prescription, to the hak which he claimed by force of the 1st section of the Bombay Regulation V. of 1827; and that their Lordships, though they upheld the decree in favour of the respondent on other grounds, intimated that they were not satisfied, either that the particular hak could properly be said to be "immoveable property" within the meaning of the Regulation, or that there had been such an enjoyment of it for thirty years without interruption as would bring the right, if in the nature of immoveable property, within the operation of the Regulation. This was the expression of a doubt rather than a positive decision. Moreover, the hak then claimed differed widely from that which is the subject of the present suit. It was a money-allowance for the sustentation of a palanquin, which had been granted by the then native power to an anc of the respondent, not as a necessary dent to the office of Desai, but as a r for meritorious service, and was made able by the native Collector out of general revenues of the Pergunnah of B received by him. As such, it resembled annuity granted by King Charles the Se out of the Barbadoes duties, which, i case of the Earl of Stafford *vs.* Buc 2 Ves. Senr., p. 170, Lord Hardwicke h be "a mere personal annuity, having relation to lands and tenements, or part of the nature of a rent by any me But, however that may be, their Lords cannot treat the decision in the palki as an authority on the present que which they will now proceed to con upon its merits.

The learned Counsel for the appel have argued, on the authority of the a mentioned cases of Krishnabhat Hir and Purshotam Sidheshvar, and partic of the latter, that the construction of Statute of Limitation must, in this part case, be determined by the light of Hindoo Law.

According to the report of the case in 9 Bombay High Court Reports, respondents had sued to recover from appellants the amount of fees due to the h of the hereditary office of the village (or astrologer) for five years. The state their Lordships conceive must be take import that the right to hold the office matter of contest between the parties; s it can hardly have been held that, bec the hereditary office was, in contempla of the Hindoo Law, of the nature immoveable property, fees recoverable by admitted holder of the office from per whose horoscope he might have cast, within the same category. The case referred to a Full Bench, partly in co quence of some difference of opinion bet the two Judges who composed the Divi Bench, and partly on account of a suppo inconsistency between the two decisions ready cited from the 6th volume of the Bom High Court Reports, which, nevertheles seem to their Lordships capable of stand together. The judgment of the Full Be was given by Chief Justice Westropp, fully upheld the decision in Krishnabhat Kapabhat, and affirmed the correctness the rule there laid down for the interp tation of Act XIV. of 1859, section 1, cl 12. The rule is shortly this, *viz.*, th inasmuch as the term "immovable p

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y" is not defined by the Act, it must, n the question concerns the rights of doos, be taken to include whatever the doo Law classes as immoveable, although such in the ordinary acceptation of word. To the application of this rule in proper limits, their Lordships see bjection. The question must, in every , be whether the subject of the suit is in nature of immoveable property, or of an est in immoveable property; and if its re and quality can be only determined Hindoo Law and usage, the Hindoo Law y properly be invoked for that purpose. n, in the two cases on which the appel- relies, Hindoo texts were legitimately d to show that, in the contemplation of doo Law, hereditary offices in a Hindoo mmunity, incapable of being held by any on not a Hindoo, were in the nature of moveables. And those decisions receive ditional support from the 1st section of the mbay Regulation V. of 1827, which pressly declares hereditary offices to be moveables, an enactment which, inasmuch it relates only to the acquisition of a title positive prescription, seems to be unaffected Act XIV. of 1859, and to stand unrepealed the Presidency of Bombay.

The learned Counsel for the appellant ve, however, insisted on the authority of se decisions that a toda giras hak must held to be an interest in immoveable pro- rty, because, according to Hindoo Law, it uld be "nibandha." Their Lordships, in aling with this argument, prefer to use the nscrit word, inasmuch as they do not think at "corrody" is a very happy translation of ; "corrody" being a word of medieval igin, properly signifying a peculiar right, ., the grant by the royal or other founder an abbey of certain allowances out of the venues of the abbey in favour of a depend- nt or servant. (See Ducange, *in verbo:* tzherbert "*De naturâ Brevium*," p. 229, rit "de corrodio habendo.")

Whether a toda giras hak be "niban- ha" within the strict sense of that term is, their Lordships' opinion, a question not ee from doubt. The original text of Yaj- avalkya, which is the foundation of all the her authorities cited by Chief Justice Westropp, implies that the subject rendered y the word corrody in 2 Colebrooke's Digest, acitum xxxiv., is something created by oyal Grant. This, too, is included in Pro- ssor Wilson's definition of "Nibandha." hat the word in the subsequent glosses on jnyavalkya's text is used in a wider sense may be due to the want of precision, for which Hindoo commentators are remarkable. It is, however, unnecessary to consider this point, because their Lordships are of opinion that the question whether a toda giras hak is an interest in immoveable property within the meaning of Act XIV. of 1859 is one which ought not to be determined by Hindoo Law. It appears from the authorities cited in the case (reported in the second volume of Morris's Report) that the Grasisas were sometimes Mahomedans, and therefore that the hak may, in its inception, have been held by a Mahomedan. It is certain that, as these haks now exist, they may pass to, and be held and enjoyed by, Mahomedans, Parsees, or Christians; and their Lordships think that the applicability of particular sections of this general statute of limitation must be determined by the nature of the thing sued for, and not by the status, race, character, or religion of the parties to the suit. The period of limitation within which the claim is barred must be fixed and uniform, by whomsoever that claim is preferred or resisted.

The determination, therefore, of the present question depends, in their Lordships' opinion, upon the general construction to be given to the terms "immoveable property" and "interest in immoveable property" as used by the Indian Legislature. Their Lordships cannot think that the former term is identical with "lands or houses." They conceive that the word "immoveable" was used as something less technical than "real," and that the term "immoveable property" comprehends certainly all that would be real property according to English Law, and possibly more. In some foreign systems of law in which the technical division of property is into moveables and immoveables, as, *e. g.*, the Civil Code of France, many things which the law of England would class as "incorporeal hereditaments" fall within the latter category.

Now, what is disclosed on the Record touching the nature of this hak?

The plaint claims it as "leviable upon the village Mouzah Kalam." The fair inference from the written statements of the respondent is that the hak existed and was regularly paid by his father, as inamdar, up to the year 1857-58. The question raised by these statements as to the right of the respondent and his father to discontinue the payments is one to be determined, not upon the issue of limitation, but on the trial of the other issues settled in the cause. The evidence taken in the suit shows that the answer

of Hukomutrai (the respondent's father), to a question addressed to him in 1856 by a native official to the effect whether there was any toda giras paid for the Maharana of Amud *on account of the village of Kalam*, was, "There are payable Broach 501 rupees for the toda of the said Rana;" that the same Hukomutrai described the money paid by him on account of this hak, in his deposition of the 6th of November 1861, as "the money on account of toda giras leviable upon my inam village of Kalam," and in his deposition of the 4th of April 1862, as "the annual amount of toda giras of my village of Mouzah Kalam;" and further, that the payments made were made out of the revenues of the village, and were so entered in the village accounts.

Taking this as the fair result of the evidence, and considering what has been ruled touching toda giras haks in the case in the 8th Moore's Indian Appeals, and other decided cases, their Lordships are of opinion that, whatever may have been the origin of the hak, it must be assumed to be now a right to receive an annual payment which has a legal foundation, and of which the enjoyment is hereditary; and that the liability to make the payment is not personal to the respondent, but one which attaches to the inamdarin to whosesoever hands the village may pass; or, in other words, that the hak is payable by the inamdar *virtute tenuræ*. This being so, their Lordships have come to the conclusion that the interest of the hakdar does possess the qualities both of immobility and of indefinite duration in a degree which, if the question depended on English Law, would entitle it to the character of a freehold interest in, or issuing out of, real property (see 1 Cruise's Digest, p. 47, Plac. 10); that, upon the general principles of construction applicable to an Indian Statute, it must be held to be "an interest in immoveable property" within the meaning of Act XIV. of 1859; and, accordingly, that the suit, having been brought within twelve years after the date of the last payment, can be maintained.

This being their Lordships' conclusion on the first and principal question argued, it is unnecessary for them to consider the second, *viz.*: Whether, upon the principles enunciated and enforced in such cases as The Dean and Chapter of Ely *vs.* Cash, 15 M. and W., Grant *vs.* Ellis, 9 M. and W., and Owen *vs.* De Beauvoir, 16 M. and W., and 5 Exch., it ought to be held that, inasmuch as Act XIV. of 1859 contains no express words to bar the right as well as the remedy, that statute can have any effect on the appellant's cl except that of preventing him from reco ing more than the arrears for the six y next preceding the institution of the Their Lordships abstain from the consid tion of this question the more willi because it was never raised in the C below; because the pleadings in the suit, w is brought to establish the right, as well a recover the arrears, assumes that the w claim is subject to the law of limitati because there seems to be a consider body of Indian authorities which support assumption; and because the limitation a cable to claims to establish rights will, a distant date, have to be determined by more carefully-drawn Statute of Limit of 1871, which is soon to supersede th 1859.

On this appeal, their Lordships will hum advise Her Majesty to reverse the dec under appeal; to declare that the appell suit is not barred by the Statute of Li tions, but was brought within time, an remand the cause for trial on its me Their Lordships think that the appel ought to have the costs of this appeal. costs incurred in India by reason of the of the second issue should be dealt with the Bombay High Court in the usual wa the final determination of the cause; appellant receiving back the costs (if which he may have paid under any of decrees reversed.

The 17th December 1873.

Present:

The Hon'ble Louis S. Jackson and W. Ains *Judges.*

Arbitration-award—Code of Civil Procedur s. 327—Appeals.

Case No. 200 of 1873.

Miscellaneous Appeal from an order pas by the Additional Subordinate Judge Dacca, dated the 22nd March 1873.

Raj Chunder Roy Chowdhry and others (Petitioners), *Appellants*,

versus

Brojendro Coomar Roy Chowdhry and other (Opposite Party), *Respondents.*

Messrs. Montriou and *C. Jackson* and *Baboos Kalee Mohun Doss* and *Ouri Chunder Banerjee* for Appellants.

e Advocate-General and *Baboos Sreenath Doss* and *Hem Chunder Banerjee* for Respondents.

ture.—Does an appeal lie from the refusal of a Court, under Act VIII. of 1859, s. 327, to order an d to be filed?

Court was held to have done right in refusing to the filing of an award which was not complete lf, and which, as a whole, the parties had not d to.

ackson, J.—This is an appeal against the r of the Subordinate Judge of Dacca, refused to order, under section 327 of Civil Procedure Code, that a certain rd should be filed. The appellants are parties who tendered that award, and, on appeal being called on, a preliminary ction is offered on the part of the ondents by the learned Advocate-General he effect that in such a case no appeal It must be admitted that, upon several he sections of this Chapter of the Civil cedure Code, much difficulty has arisen m time to time, and, speaking for myself, I ess that my mind is not free from doubt to whether an appeal in this case does perly lie. On the whole, we are inclined to k that the case will be most conveniently erned by the Full Bench Ruling in 15 ekly Reporter, and that an appeal under t ruling ought to be allowed. But this is natter on which it is not necessary that we uld express any decided or strong opinion, ause we are quite satisfied, on the merits the case, that the appeal ought to fail. ere were several objections to the filing of award, any one of which almost would ve been sufficient to oblige the Court to fuse filing it. In the first place, there is e objection upon the face of the application, ich is brought to our notice by the learned dvocate-General, that the parties tendered r filing and for enforcement, not the whole ard entered into between them and the pposite party, but only a portion of it; for ey stated, towards the close of their petition, at, in dealing with a portion of the matter ferred to him, the arbitrator had exceeded s power, and that they were not therefore ound by his decision in respect of that atter.

It appears to us that the Legislature in ection 327 contemplated the submission of n award complete in itself, and which, taken s a whole, the parties should agree to. This ard does not comply with that requirement, nd consequently the Court below was quite ght in refusing it to be filed under section 27. In addition to that, it appears that the eference was not made by the parties themselves, but by a Mookhtear, who considered himself, as he says, empowered by the terms of a mookhtearnama, which has been read to us. It seems to us that that the mooktearnama conferred no authority to make any such reference. It is not general, but specific, in its terms. It enables the parties named therein, who are several, to appear and do the necessary acts in Courts of Justice and public offices, and also to do certain other specified acts. It contains nothing to empower the Mookhtear to deal with the interests of the parties granting the mookhtearnama, and in our opinion contains no such terms as would cover a reference to arbitration. As to the sufficiency of the power on behalf of the minors, we are also not prepared to say that the mookhtearnama is not defective. It is much to be lamented that the Subordinate Judge, in giving a decision on this point, should have fallen into a serious error of fact, because this error, which probably could have been rectified, on application, by the lower Court, has been the main inducement to the parties to prefer this appeal. If the Subordinate Judge had been a little more careful in his statement of the facts, he might have avoided this error, and then, probably, the parties would not have come up to this Court. As the case stands, we think that the objections taken to the filing of the award are good, and that the lower Court was right in refusing to order it to be filed.

The appeal is therefore dismissed with costs—20 gold mohurs.

The 18th December 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Unstamped Documents—Act VIII. of 1859, s. 130—Jurisdiction.

Case No. 501 of 1873.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 24th September 1872, affirming a decision of the Subordinate Judge of that District, dated the 28th October 1871.

Zumeerooddeen Shah Fukeer (Plaintiff), *Appellant,*

versus

Doorga Kant Surmah Chowdhry and another (Defendants), *Respondents.*

Baboo Ashootosh Dhur and *Moulvie Syud Murhumut Hossein* for Appellant.

Baboos Kalee Prosunno Dutt and *Kishen Dyal Roy* for Respondents.

Where the first Court does not admit as evidence a document, because it is not stamped, and refuses to take the penalty proffered with reference to the Code of Civil Procedure, s. 130, the remedy open to the party aggrieved is to make the refusal a ground of objection n appeal. Where this is not done, the High Court cannot, in special appeal, interfere on a mere affidavit containing a one-sided statement.

Glover, J.—THIS was a suit brought by a Farkeer of the name of Zumeerooddeen Shah to recover possession of an elephant, which, he alleged, had been forcibly taken from him by the defendants Nos. 3 and 1, Nil Kant and Doorga Kant, in Magh 1277. He states that he purchased this elephant from one Toofanee Sircar on the 4th of Bysack 1267 for Rs. 431. Doorga Kant is the only defendant who has come in and made any answer to the suit. He says that the elephant belongs to him and his co-sharers, one of whom is the defendant Nil Kant, and that it was made over to the plaintiff by Nil Kant, who intended, by that arrangement, to keep the fact, that he had purchased the elephant from the joint family-funds, a secret, and thus deceive his co-sharer. Both the Courts below have decided that the plaintiff has not proved his right to the elephant.

In special appeal it is contended that the Moonsiff in the first place was wrong in not admitting as evidence the receipt said to have been given by Toofanee Sircar, by which the plaintiff tried to prove that he bought the elephant, simply because it was not stamped; that he ought, under section 130 of the Procedure Code, to have taken the regulated penalty, and have allowed the document to be put in. On this part of the case, the Judge says that there is nothing to show that the penalty was ever offered by the plaintiff, and no doubt there is nothing on the record to show this. If it be the fact that the plaintiff was willing to pay the penalty, and that the Moonsiff refused to t it, the refusal should have been made ground of objection to the Judge in app where the point could have been cleared without any difficulty. This was not do and at this late stage of the case, with any other material before us than an affida which merely contains a one-sided statem which we have not the means of testing, should not be justified in interfering w the Judge's decision on the point.

Then it is said that, considering the c cumstances of the case, and as the plain has undoubtedly been in possession of animal for eleven years before it was tak away from him, the *onus probandi* w properly speaking, on the defendants.

It does not seem that any question *onus* was raised in the Courts below, or th in fact, it has been placed exclusively up anybody in particular in this case. T Judge has considered the evidence on bo sides, and he has found that the plaintiff h failed to prove his purchase; and further, th the animal was bought by the defendant wi the funds of the joint family, and was ma over to the plaintiff in trust.

Then it is said that, under any circu stances, Nil Kant's share of the anim ought to have been decreed to the plaint as Nil Kant ought not to be allowed to ta advantage of his own wrong. But no fra on the part of Nil Kant against the oth members of the family can affect the plain iff, and, so far as the plaintiff is concerne there has been no fraud. The elephant w either bought by him as he says, or given his charge by Nil Kant. Nil Kant ma perhaps, have acted in fraud of his co-sharer but it will be time enough to inquire in this when his co-sharers bring a char against him, and there is no fraud as betwee him and the plaintiff. The plaintiff electe to prove a certain state of facts which h altogether failed to do, while the defendant on the other hand, have, in the opinion o both Courts below, proved a state of fac quite antagonistic to that represented b the plaintiff. There is no error in law i the Lower Appellate Court's decision, an we must therefore uphold it. The specia appeal will be dismissed with costs.

The 22nd December 1873.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Insolvency—Act VIII. of 1859, s. 273—Jurisdiction.

Case No. 340 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Hooghly, dated the 19th September 1873.

Kristo Lall Gossain (Judgment-debtor), *Appellant,*

versus

Joy Gopal Bysack (Decree-holder), *Respondent.*

Messrs. *J. W. Lowe* and *C. Jackson* and *Baboo Mohendro Lall Mitter* for Appellant.

Mr. *T. D. Ingram* and *Baboo Romanath Law* for Respondent.

Except under very special circumstances, a Judge is not to make an order for the discharge of a defendant under Act VIII. of 1859, s. 273.

A party who voluntarily brings himself into the Insolvency Court in Calcutta is incapable of applying to a District Judge for a discharge under the above section; the property which he may be possessed of within the jurisdiction of the former Court not being subject to the latter.

Jackson, J.—This was an application to the Judge in an execution-case under section 273, in which the Judge refused to make an order for the discharge of the defendant. This is undoubtedly a matter of discretion, and, although the law allows an appeal in such case, it has been held that, except under very special circumstances, the Judge ought not to make an order for the discharge of the defendant. Here it seems that the Judge was not satisfied, and there certainly was reason for him not being satisfied, that the petitioner had made a full disclosure of the whole of his property in possession or in expectancy. The Judge refers to a particular item of property which, on the face of the evidence, belonged to the petitioner, but which he did not include in the schedule submitted to the Judge; and although the Judge does not say so in express terms, it seems that that circumstance raised a suspicion in his mind as to the probability of the petitioner having other properties besides those mentioned in the schedule. In addition to that, it appears that the petitioner, after making his application to the Judge, and before the Judge's order was passed thereon, voluntarily brought himself into the Insolvency Court in Calcutta by a petition made in August last. It has been held that section 273 does not apply to a case of insolvency where the whole of the debtor's property is vested in the official assignee. The petitioner, therefore, has, by filing such petition, put it out of his power to apply under this section. We think the property which he may be possessed of within the jurisdiction of the Insolvent Court is not subject to the other Court executing the decree. Under these circumstances we think that no ground has been shown for disturbing the decision of the Judge refusing to discharge the defendant.

The appeal is dismissed with costs—five gold mohurs.

The 6th January 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Bond-suit—Limitation—Usufructuary Mortgage—Power of Sale—Rights of Mortgagee.

Case No. 294 of 1873.

Special Appeal from a decision passed by the Judge of Gya, dated the 24th September 1872, affirming a decision of the Sudder Moonsiff of that District, dated the 4th July 1872.

Mussamut Choharo Dhamin (one of the Defendants), *Appellant,*

versus

Chumun Lall *alias* Chumari Lall (Plaintiff), *Respondent.*

Baboo Boodh Sen Singh for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

Where a plaintiff asks for realization of money due on a bond by a decree for sale of the property mortgaged by the bond, the suit is not barred, though brought later than three years from the time when the money became repayable and was not repaid.

An usufructuary mortgagee, who has no power of sale under his lease, even for the purpose of realizing the money due to him from the mortgagor, cannot give a third party a power of sale over the property in respect to his own debt. The utmost he can do is to assign his rights and remedies against the mortgagor; but, whatever the character or extent of those rights and remedies, they cannot be pursued in a suit to which the mortgagor is no party.

Phear, J.—We think that this case has not been satisfactorily investigated and dealt with by the lower Courts.

The principal facts disclosed by the evidence are as follow:—

On 15th May 1868 (Jeith 1275) one Lochun Panday Dhomi borrowed from Lall Halwai Rs. 75 at the rate of ½ anna per rupee per month, or 37½ per cent. per annum, and engaged to repay the principal and interest in the end of Cheyt 1276 F. S.

At the same time, to secure repayment of this money, he mortgaged to Lall Halwai three separate parcels of birt land, each consisting of 3 kanwas in area, and empowered Lalla Halwai to realize the mortgage-debt from these lands in the event of non-payment at the stipulated time.

On 8th December 1871, Lalla Halwai sold his right under this transaction to the present plaintiff, Chumun Lall.

On 22nd April 1872, Chumun Lall, Lochun being then dead, sued Lalla Halwai and Mussamut Choharo, Lochun's widow, seeking to recover Rs. 185-11 under the bond of May 1868, and to have this sum of money realized by sale of the mortgaged properties.

The first Court gave a decree for Rs. 185-11 against Mussamut Choharo alone, and did not order a sale of the mortgaged property.

An appeal from this decree, which Choharo preferred to the Judge, was dismissed. She therefore prefers the present special appeal to this Court.

Her first ground is that the suit is barred; and no doubt, so far as the suit is only a suit to recover money due from Lochun Panday or his representative on the footing of the unregistered bond of 1868, this objection is good. The money was due at the end of Cheyt 1276 (*i. e.*, the middle of April 1869), and the suit was instituted on the 22nd April 1872.

Consequently, the decree which the lower Courts have made against Choharo, whether intended to be operative against her personally or against the general assets of her deceased husband in her hands, is invalid.

Inasmuch, however, as the plaintiff asked for realization of the money due on the bond by a decree for sale of the property mortgaged by the bond, and as a suit for this purpose is not barred, the Lower Appellate Court ought not to have confined itself to passing an invalid money-decree, but should have inquired whether or not the plaintiff had made out any right to have the property in suit, or any portion of it, sold as he claimed.

Now, on referring to the mortgage-bo of 1868, we find the description of the th parcels of land as follows:—

Three kunwas of birt land situated o certain hill, which Lochun held by vi of the purchase of the right, title, a interest therein of one Sookram Dhami.

Three kunwas of birt land held by Loch under a deed of bhukhubandak executed Gopal Dhami on 8th August 1864 (Sa 1271).

Three kunwas of birt land held by Loch under a deed of bhukhubandak executed the said Gopal Dhami on 27th January 1 (Magh 1275).

And the bhukhubandaks, which w handed to Lalla Halwai together with bond, and which are put in evidence by plaintiff, turn out to be merely usufructu leases, each for *one year* only without power of sale.

Thus it does not appear that Lochun hi self had any power of sale, with regar the two last parcels, even for the purp of realizing the money which was due him from Gopal. Certainly he could n give Lall Halwai a power of sale over th parcels in respect to his own debt. T utmost he could do was to assign to La Halwai all his rights and remedies aga Gopal. And, probably, the words of the b "realize from the property" are best co strued by taking them to give all necess powers, not merely of sale only, for t purpose of making the property available the liquidation of the debt so far as Loch could give them.

If, however, we assume that this in s stance was the effect of his bond to La Halwai, even then, whatever the charac or extent of these rights and remedies, th cannot be pursued by Lalla Halwai, or h his assignee in this suit, to which Gopal no party.

Consequently, it appears very clear t the plaintiff's own case that he is not in th suit entitled to a decree for sale of eith of the two parcels of land lastly mention in the bond, or to any other order w regard to them.

At the same time there appears to b nothing to prevent the mortgage-debt fro being well charged upon the remaining kunwas; and the extent of charge seems t be the amount of money due on the bon at the end of Cheyt 1276, *i. e.*, Rs. 128-14-6 and interest thereon from that date t the date of sale at a resonable rate, no 6 per cent., or so much thereof as rem

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...id, together with costs of suit. There ...t, therefore, to be a declaration to this ...t, and an order for sale within two ...ths, unless that sum is paid beforehand. ... plaintiff appears to be contented to ... no decree against Lalla Halwai.

The 6th January 1874.

Present:

Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

...endment of Plaint—Defect of Parties—Act VIII. of 1859, s. 73.

Case No. 1321 of 1873.

...cial Appeal from a decision passed by ...e Additional Judge of Backergunge, ...ated the 28th March 1873, affirming a ...ecision of the Subordinate Judge of ...urreedpore, dated the 27th September 1871.

...nab Ali Mollah and another (Plaintiffs), *Appellants,*

versus

...Golam Assad Chowdhry and others (Defendants), *Respondents.*

...aboos *Sreenath Doss* and *Doorga Mohun Doss* for Appellants.

...aboo *Kashee Kant Sen* for Respondents.

...a suit in which plaintiff claimed several plots of ...but did not specify the boundaries in respect of one of them, it was held that the proper course was for the Court to call upon the plaintiff to amend his plaint.

Where a suit was ready for hearing, the first Court was *held* to have done wrong in dismissing it on the technical ground that persons having interest in the subject-matter had not been made parties; it being the duty of the Court to take action under Act VIII. of 1859, s. 73.

Jackson, J.—THE pleader for the special respondent very properly admits that he cannot support this judgment, and it is certainly lamentable that, after a plaint has been filed, and the defendants have appeared, when the parties filed their evidence, and examined their witnesses, and after a local inquiry has taken place, the plaintiff's suit should be thrown out on such grounds as are stated in the judgment of the Court below. The first ground stated by the Judge is that in respect of one of the three plots of land claimed, the plaint contains no boundaries. It appears that the plaintiff sought to recover firstly, plot No. 1; nextly, a 5½-annas share of plot No. 2; and thirdly, plot No. 3. The alleged difficulty is in respect of the 5½-annas share of plot No. 2. No doubt the plaintiff might have been in the first instance called upon to amend his plaint by setting out the boundaries of this 5½-annas share, but no objection was then taken on that score, and whatever objection may have been taken seems to have been disposed of by the result of the Ameen's inquiry, which found the boundaries of the 5½-annas share to be those given in the solehnama.

As to the defect of parties, it seems almost incredible that, after the enactment of section 73, Act VIII. of 1859, the Judge should, when a suit is ready for hearing, and when he himself has failed to take action under that section, dismiss a suit upon the technical ground that some persons having interest in the subject-matter of the suit have not been made parties. If it were at all necessary, it was the duty of the Court to take action under that section, and bring the proper parties on the record. It does not appear that any person has been prejudiced by not having been made a party to this suit, and the dismissal of the suit on such grounds, so many years after the enactment of the Code, is inexplicable. The judgments of both the Courts are accordingly set aside, and as it appears that exhibits have been filed; and witnesses examined on both sides, the case is remanded to the Lower Appellate Court for a decision on the merits. The costs will abide the result.

The 13th January 1874.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Execution—Bona Fides.

Case No. 284 of 1873.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 12th July 1873, affirming an order of the Moonsiff of Jehanabad, dated the 20th May 1873.

Shaikh Irshad Ali (Judgment-debtor), *Appellant,*

versus

Kadoo Shah *alias* Golam Kadir (Decreeholder), *Respondent.*

Mr. M. L. Sandel for Appellant.

Baboo Ashootosh Dhur for Respondent.

Where a judgment-creditor, finding that all the available property of his judgment-debtor has been made away with, sets about the task of bringing back the property, the question whether his action is a proceeding taken to enforce the decree is one, not of law, but of fact, to be determined by the subsequent conduct of the judgment-creditor as showing a *bond-fide* intention to execute or otherwise.

Markby, J.—In this case it appears that the decree was obtained in 1862, and that the first proceedings in execution were taken in August 1864. Certain objections were then taken, which were disposed of finally on the 16th of May 1865. On the 11th September 1865, the decree-holder was directed to proceed with his execution within two days, but he took no further step, and, on the 28th of August 1866, the case was struck off.

At the same time there was pending against the judgment-creditor a decree obtained by the judgment-debtor for a smaller amount which, under section 209 of the Code of Civil Procedure, the judgment-creditor was bound to set off, but he had not done so.

At some time in 1866, the judgment-debtor attempted to transfer his decree into the name of some other person (benamee as it is called), so as to prevent its being made available to the judgment-creditor for a satisfaction *pro tanto* of his own decree. The judgment-creditor thereupon objected, and, on the 17th August 1866, that is to say, before the execution-proceedings in this suit were struck off the file, the judgment-creditor succeeded in setting aside this transfer.

The Moonsiff held, and the District Ju apparently agrees with him (though grounds of his decision are not quite cl that the action of the judgment-creditor which he prevented the attempt of the ju ment-debtor to transfer his decree another name was a proceeding taken enforce the decree which the judgme creditor now seeks to execute. The pre case turns entirely upon this question. was so, the present application is in ti otherwise not.

It appears to me, however, that this i question not of law for the Court of spe appeal, but of fact for the Courts below. think it impossible to say as a matter of that action taken to prevent the judgme debtor from making away with his prope may not be, in some cases, a proceeding enforce the decree within the meaning of section. If an application for execution made, and the judgment-creditor then covers that all the available property of judgment-debtor has been made away w his only course would be to suspend execution-proceedings, and set about the t of bringing back the property—a task whi it would very likely take more than th years to complete ; and, if, having got ba the property, the judgment-creditor proceed to execute his decree upon it, I should thi it reasonable to say that he had been along taking proceedings to enforce his decre On the other hand, if, after having succeed in bringing back the property, he took steps to realize his debt, I think I shou hold in the absence of explanation that t judgment-creditor had all along no re intention to execute his decree, and that th proceedings to which I have alluded we taken, not in furtherance of execution, b only in order to keep the property of th judgment-debtor available to the judgme creditor when he should think fit to execu the decree.

From these observations it will be see that it is not impossible that I should hav come myself to a different conclusion upo the facts of this case, but, inasmuch as th question was one of fact, the decision of th Court below is conclusive and cannot be di turbed in special appeal.

I think therefore that the appeal should be dismissed with costs.

Birch, J.—I concur in thinking that we ought not to interfere in this case. It seems to me to be a question of fact whether the action take by the decree-holder evinces an intention to keep his decree in force. Be

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lower Courts have come to the conclu- that, in acting as he did, the decree- er was doing his best to keep his decree , and I would not interfere with their ng in special appeal.

The 14th January 1874.

Present:

Hon'ble Sir Richard Couch, *Kt., Chief ustice,* and the Hon'ble Louis S. Jackson, *udge.*

Res Judicata—Act VIII. of 1859, s. 2.

Case No. 1536 of 1873.

ial Appeal from a decision passed by the fficiating Judge of Hooghly, dated the th April 1873, affirming a decision of e Subordinate Judge of that District, ated the 24th June 1872.

ib Nath Chatterjee (Plaintiff), *Appellant,*

versus

Nubo Kishen Chatterjee and others (Defendants), *Respondents.*

aboo Mohinee Mohun Roy for Appellant.

boos Bama Churn Banerjee and *Juggut Chunder Banerjee* for Respondents.

he cause of action in a suit cannot be said to have n heard and determined in a former judgment ss it was put in issue and directly determined. Any ing or observations merely bearing on such issue, ny opinion incidentally expressed, cannot be con- red a finding upon the issue so as to make that gment a determination of the cause of action hin the meaning of Act VIII. of 1859, s. 2.

Couch, C.J.—We think both the lower urts have put an erroneous construction on the judgment in the first suit. In der to make section 2, Act VIII. of 1859, plicable, it must clearly appear that the use of action in this suit was heard and termined in the former suit. Now Mr. hompson, in his judgment in the former it, says that all that he considers it neces- y to determine is "whether the plaint is o inexplicit and ambiguous as not to be considered cognizable—whether plaintiff an hold defendant Bijoy responsible for the "claim brought against him—whether the "back and current rents are due for the "period under review, and recoverable by "plaintiff from defendant Bijoy." Whatever the issues framed by his predecessor may have been, Mr. Thompson determined only these questions. He did not consider it necessary to determine anything else. He does not, in any one of these questions, determine whether the plaintiff had a cause of action against the persons who are defendants in the present suit. They were, it is true, made parties to the former suit; but Mr. Thompson seems to have considered that they were made so, not for the purpose of enabling the plaintiff to recover anything from them, or of proving that they were liable to the plaintiff for anything, but probably because, as has been suggested, they were interested in the determination of the question what the share of the plaintiff was. The Judge, Mr. Prinsep, appears to have considered that Mr. Thompson's judgment in the former suit did determine the question whether the plaintiff was entitled to recover anything from any of the defendants, because there was an issue raising that question. There was, indeed, amongst the issues which were framed by Baboo Grish Chunder Ghose, one of that kind, but Mr. Thompson had, in his judgment, expressly stated what he was going to determine. It may be that in that judgment there is a finding which may have some bearing upon that issue, or his judgment may contain observations applicable to such an issue; but he did not directly determine it. Any opinion which he may have incidentally expressed cannot be considered a finding upon the issue, so as to make his judgment in the former suit a determination of the cause of action in the present suit. It appears to us that what was really determined in the former suit is whether the plaintiff could not recover from Bijoy. This is not the question in the present suit. The question now is whether the plaintiff is not entitled to recover from the present defendants. The decision of the Lower Appellate Court must be reversed, and the suit be remanded for trial upon the questions raised in it. We think it is proper to add that we do not approve of the manner in which the Judge has spoken of the decision of Mr. Thompson. Whatever defects there may be in Mr. Thompson's judgment, we do not think it was proper to speak of it in the terms which the Judge has used. It was not calculated to do any good. The costs will follow the result.

The 14th January 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Ancestral Property—Partition—Proprietary interests of Minors.

Case No. 11 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 27th September 1872.

Muddun Gopal Lall (Defendant), *Appellant,*

versus

Mussamut Gowurbutty (Plaintiff), *Respondent.*

Mr. C. Gregory and *Baboo Chunder Madhub Ghose* for Appellant.

Baboos Romesh Chunder Mitter and *Rash Beharee Ghose* for Respondent.

Until a division of ancestral property is effected, no member of the family can give a stranger any interest in the property.

In a suit by the mother and guardian of two minors to obtain a partition of joint family-property free from the encumbrance which the father and the other sons had put upon it, wherein a third party was co-plaintiff by virtue of an alleged conveyance from the plaintiff, the Court did not allow such party to remain on the record as co-plaintiff, holding that the mother and guardian could not give him a right of suit against the other members of the family, and that the proprietary interests of the minors might ultimately be prejudiced.

The following order was passed on the 7th January 1874.

Phear, J.—We think that the parties to this appeal have probably been somewhat misled in the Court below by reason of the very vague and inaccurate form which the Subordinate Judge gave to the issues. Apart from the plaintiff's issues, namely, the issues, *first,* whether or not the property in suit is the joint property of the two minor sons for whom the plaintiff appears, and the father and the elder son, second defendant, constituting together a joint family under the Mitakshara Law? and, *second,* if it is so, in what shares are they entitled to it; the principal matter of contest in the case is the right of the present appealing defendant to have a valid charge upon the whole estate which the plaintiffs seek to divide. It hardly seems to be disputed that the plaintiffs are entitled, as they say, to have the property divided as between themselves and the two first defendants. But, although this may be so, yet, if the allegations of the other defendants in the suits are good, then this division of the property must be subject to the charges which these defendants allege that they have on the whole estate. In this state of the after the right of the plaintiff on the of the minors to have a division of the property was determined, came the one principal issue, of the case just mentioned, namely whether or not the appealing defendant entitled to the charge which he sets up upon 8 annas of the entire estate, as against the shareholders. The affirmative of this issue, of course, as has been already thrown out in the course of the argument, must rest upon the person claiming to have the charge, that is, upon the appealing defendant. As we think, as far as we can judge from the materials put before us, that the appealing defendant was prepared to give evidence in support of the affirmative of that issue, if he had not been made to understand that the Court did not call upon him to support that issue. The Subordinate Judge, by the interlocutory orders which he made during the hearing of the case, seems to have given very naturally to the impression on the part of the defendants that there was no necessity in this case for them to give evidence in support of the particulars of their claim.

Under all the circumstances, then, we think that they ought to have that opportunity afforded them (we are speaking, of course now with reference solely to the appealing defendants), and that, subject to the remarks which we are about to make presently, the case ought to go back in order that evidence may be taken upon the issue just now stated.

But, before we send down the case for this purpose, we think we must determine whether the plaintiff, Ram Pershad Misser, ought to be allowed to remain on the record joined with the mother of the two minors as co-plaintiff in this case. He claims to be joined entitled with them by virtue of a conveyance which he alleges has been made to him by the mother and guardian of the minors of the 2-annas share out of their 8-annas share of the entire property. It seems that this conveyance, by the nature of the case, must have been made before the minors had any share separate from the rest of the family out of which such a conveyance could be made. The very ground upon which the plaintiff on behalf of the minors seeks to obtain their share of the estate clear of the incumbrances put by the father upon

ld serve to show that Ram Pershad
er can as yet have no right of any sort
the property. Until the division is
ted, no member of the family can give a
ger any interest in the property. If
be so, we ought not to allow Ram
ad Misser to remain on the record as a
laintiff jointly with the mother and
dian of the minors, because it is exceed-
likely that, in the event of his becoming
at way joint decree-holder with her in
suit, the proprietary interests of the
ors would ultimately be greatly pre-
ced. This Court is bound, quite irre-
tive of any objection which may be made
e parties, to take care, so far as it can,
the interests of the minors who are
nts before it are protected and insured.
e same time, as the learned counsel who
appeared to-day on behalf of the plaint-
is retained jointly for all of them, we
k that, before we come to a final con-
ion upon this point, we ought to give
n Pershad Misser an opportunity of being
rd separately either in person or by coun-

The learned gentleman who appears on
alf of the minors cannot in this particular
tly appear also for Ram Pershad Misser,
n the question is whether or not it would
detrimental to their interests that he
uld be allowed to remain on the record as
plaintiff with their guardian. We there-
, before making a final order, must direct
the further hearing of this case stand
r till Tuesday next, in order that Ram
shad Misser may, on that day, have an
portunity of being heard on this point.

By consent of parties, let the like orders
made in the other two cases, namely,
os. 32 and 49 of 1873.

Final order.

Phear, J.—The only question which we
e to consider now is whether Ram Per-
ad, by virtue of the conveyance of 2-annas
are of the property which, he alleges, he
tained from the mother and guardian of
e minors, became jointly entitled with
em to the right which is sought to be
forced in this suit. It appears to us that,
withstanding the argument which we
e just heard, Ram Pershad, in the very
int which he has joined the others in
esenting to the Court, has given the very
st reason for the conclusion that he is not
jointly entitled. The object of the suit is
obtain a division of the property free from
e encumbrance which the father and the
her sons have put upon it, because, as is maintained in the plaint, the father and the sons, not being all the members of the joint Mitakshara family, are unable to put any charge upon, or give a third person any right as against, the estate, unless it be the case, of course, that, in professing to do so, they have been acting on behalf of the whole family, and the incumbrance upon, or claim against, the estate created by them is rendered unavoidable by the urgency of a family necessity. But exceptional cause of this sort is entirely foreign to the purposes of this division. The partition, which is now sought, and the right to claim it which is said to have been created in favour of Ram Pershad, is not founded on, or attributable in any way to the purpose of meeting any family necessity, but to the purpose of realizing the special right of property which each individual member of the family is entitled to assert by reason of being member of the joint family, namely, the right of having a division, and which he cannot alone assign against the rest of the family.

While then, on the one hand, the guardian of the minors denies the right of the other members of the family to impose a charge upon the estate, and brings this suit on their behalf in order to clear away such charge, she, on the other hand, assumes a similar right on the minor's part by conveying to Ram Pershad, under a deed of sale, a second share of the estate without any privity on the part of the other shareholders, and joining him with the minors in this suit for partition against the other members of the family. The most, if anything, which the guardian of the minors could pass to Ram Pershad *before* partition of the estate, would be a right as against them to claim a portion of their share of the estate, when it should be called into being by partition. She cannot give him a right of suit against the other members of the family.

Then Ram Pershad not having any joint right with the minors in the matter of this suit, we think that he ought not to be allowed to remain upon the record as co-plaintiff with them, because, in the event of his obtaining a decree jointly with them, he clearly would obtain a very great advantage as against them in the event of their having cause at any time hereafter to deny and resist his right to obtain, as against them, the benefit of the contract which has been made with him by their guardian on their behalf. We think that they ought not to be placed in this situation of disadvantage. Whatever rights the conveyance from the mother and

guardian may have given to Ram Pershad, under the circumstances which have occurred in this case, ought to be determined independently of, and ought not to be in any degree involved in, the matter of this suit. We must be understood expressly to abstain from giving any opinion whatever upon the merits of the claim which Ram Pershad may possibly have under this contract against the property of the minors hereafter, when the minors shall have realized that property by means of this suit or otherwise.

We have already said that the suit must go back, but we now add that the record, before it is sent back, must be reformed by striking out the name of Ram Pershad from the plaint.

The 16th January 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Title—Adverse Possession—Estoppel.

Case No. 98 of 1873.

Regular Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 21st January 1873.

Ram Runjun Chuckerbutty (Plaintiff), *Appellant,*

versus

The Deputy Commissioner of Sonthal Pergunnahs for the Court of Wards, on behalf of the estate of Mussamut Sheo Soonduree Kooeree, and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Mr. C. Gregory and *Baboo Unnoda Pershad Banerjee* for Respondents.

In a suit against S and G, to recover possession with mesne-profits, plaintiff claimed the land as part of an estate (M) which belonged to him and his ancestors by the title under which it was held, and had been in their possession very long under that title; and that he had held the property as of right adversely to S or any one else for a period which sufficed to give him a title.

The lower Court made Government a party, and finding that plaintiff's father had repeatedly taken from Government a farm of the villages in question after they had been declared not to be a portion of M, but of a resumed talook, concluded that plaintiff was estopped by the conduct of his father:

HELD that Government ought not to have been made a party, for plaintiff did not couch his plaint in any degree adversely to Government; and that the father's acts were no estoppel to the plaintiff such as to prevent him from instituting the present suit against S and G:

HELD that, if plaintiff's possession was simply that of a tenant, then his right of suit, if any, would be against the Government for damages for wrongful ejectment, and not against third parties.

Phear, J.—THIS suit has been determi by the Court below against the plaintiff a preliminary issue; and we think that decision of that Court is erroneous, and be set aside, and that the suit must be back to be tried upon its merits as bet the plaintiff and the original defendants.

The plaintiff sued certain persons of first part, whom we may call the Singhs, Mr. Grant of the second part, to reco possession of certain property, together damages in the shape of mesne-profits and in respect of, the period during wh he says he had been dispossessed. He that he was entitled of right to the im diate possession of the lands which are subject of suit, as proprietor, and he ba his title upon two grounds: In the place, he said that the land in question part of a certain estate termed Talo Mahomedabad, and belonged to him and ancestors by the title under which that e was held; and further, that he and predecessors had been in possession of it a very long period under that title until was himself dispossessed by the second pa defendant. The second ground was th independently of the title just mentioned, had held this property as of right advers to the proprietors, if the Singhs, first pa defendant, or any one else not himself, w the real proprietors of it for a period wh sufficed, under the Statute of Limitation, give him a title. And he finally said th his father having had possession of this pr perty, and after his father himself as a mino he was dispossessed by Mr. Grant, wh assumed a right to dispossess him as th lessee of the Government in April 1862.

It was objected by the defendant that th plaintiff's suit was barred by the Act o Limitation; and also that he was estoppe from bringing this suit by reason of th conduct of his father in taking certain settle ments from the Government.

The lower Court thought it necessary t make Government a party to this suit. An finding that the plea of limitation was no made out, it arrived at the opinion that th conduct of the father, as alleged, was such a to estop the son from bringing this suit. And accordingly it dismissed the suit wit costs as regards all the defendants.

The mode in which the estoppel was thought by the Judge to be made out is thus explained by him:—

"But, though not barred by limitation, it "appears to me that the plaintiff is clearly "precluded from proceeding with the prese

use by the acts of his father in taking a rm of those villages from Government fter they had been declared not to be a rtion of Mahomedabad, but liable to ssessment as being a portion of the sumed estate of Talook Sunkura. The se is one to which the doctrine of estoppel ost undoubtedly applies. The Collector ad declared the villages to be liable to ssessment as part of Talook Sunkura, and is next step in the ordinary course would ave been to eject plaintiff's father from e possession he had in them. Plaintiff's ther, to avert this ejection, takes the vil-ges in farm as being part of Talook unkura. It is true he appealed against e Collector's order to the Special Com-issioner, thus showing that he did not bmit or acquiesce in the order, and it ay be, looking at the circumstances of e case, that this first settlement may have een made under pressure. But we find risto Chunder in 1860, after the final der of the Special Commissioner had een passed, again obtaining a settlement f these villages, and again the year after pplying for a fresh settlement. With a uccession of continued acts such as these before us, in each of which he clearly admitted that the villages were not part of Mahomedabad, but part of Talook Sunkura, and when we see that these acts of sub-mission induced the Government to continue him in possession, it would be most unjust now, were his son allowed to advance afresh the plea which Baboo Kishen Chunder withdrew in 1853, namely, that these five villages are part of his decennially-settled estate of Mahomedabad."

But the Judge abstains from mentioning e person in regard to whom it would be njust that this suit should be brought. It difficult to understand how the lower Court supposed this equity to arise on behalf of the defendants or any of them. These acts on the part of the father may possibly no doubt be valuable evidence as bearing upon the merits of the case; but it does not appear to us that out of them arises any consideration to the effect that it would be inequitable to allow the plaintiff to put forward a true case, simply because his father had done these acts. The Government does not appear to have been injured by them in any way; nor does it seem that the Singh defendants were misled by these acts into taking a course which a decision in favour of the plaintiff in this case would make prejudicial to them. In short, we are unable to see that any matter of estoppel, such as to prevent the plaintiff from instituting this suit against the Singhs and Mr. Grant, arises out of these acts of the father, and therefore we think that the decision of the lower Court is wrong, and that the case must be sent back to be tried on its merits.

We further think that the Government ought not to have been made a party to the suit by the lower Court. The plaintiff put forward in his plaint a claim of an entirely private nature against the defendants whom he sued; and no decree which the Court could in this suit have passed between him and the defendants whom he sued would have prejudiced the Government in its rights in any way whatever. Nor does it seem to us that the plaintiff couched his plaint so as in any degree to favour the view that he was taking up a position adverse to the Government. No doubt, in one part of his plaint, he says that he is entitled to these lands by virtue of a title which, as regards Government, was considered a lakhiraj title; but he also in another part of his plaint says that, even if he was under an obligation to pay revenue to Government, and to submit to an assessment of these lands by Government, still he had the proprietary right to possession, on which he based his suit as against the defendants whom he sued. This being so, it was an unnecessary embarrassment to the parties in this case to put the Government upon the record at all. And it does not appear that the plaintiff at any stage of the proceedings asked the Court to do so. And therefore in our view it is not fair and equitable that he should be made, as the lower Court has ordered him, to pay the costs of the Government.

It is not necessary for us now to discuss the reasoning upon which the lower Court has founded its opinion that the plea of limitation is not made out. No doubt, the Judge came to that opinion upon a somewhat narrow view of the nature and extent of the plaintiff's claim. But, taking the claim in its full extent, and considering merely the question whether or not the possession, which, the plaintiff says, he and his predecessor had been enjoying as proprietors for a long period, came to an end more than 12 years before suit, we must hold upon the facts which are before the Court that the plaint is brought within time.

It has, on the part of the defendants, been pressed somewhat urgently upon us that the possession of the plaintiff's father for some considerable portion of the period upon

which the plaintiff relies, was not possession as proprietor, but as a tenant under a lease from the Government, and that that possession duly came to an end. Whether this is so or not is a matter of fact which has not yet been inquired into. But it is a fact which bears upon the merits of the plaintiff's case, and not upon the issue of limitation. If it be true that the possession which the plaintiff alleges was a possession of right as proprietor, was not such possession at all, but simply possession as a tenant of the Government to whom the land belonged, then the right of suit, if any, which remained to the plaintiff upon the events stated, would be a right of suit against the Government for damages for having turned him out wrongfully; and not a right of suit against third parties for possession of the lands as proprietor.

We direct that the name of the Government be taken off the record as defendant, and we direct further that the decision of the lower Court be reversed, and the case remanded for trial between the plaintiff and the original defendants.

We make no order for the costs of the Government, because we are of opinion, as has already been mentioned, that the plaintiff is not liable to pay them; nor indeed has any cause been shown why any other party should pay them in the Court below or in this Court.

We reserve the question of costs as between the plaintiff and the original defendants to abide the event.

The 22nd December 1873.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Judgment-creditors—Appeal—Attachment—Act VIII. of 1859, s. 271.

Case No. 232 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of the 24-Pergunnahs, dated the 23rd June 1873.

Jugobundhoo Shah Poramanick and others (Decree-holders), *Appellants,*

versus

The Official Assignee (Judgment-debtor), *Respondent.*

Mr. C. Jackson and *Baboo Romanath Law* for Appellants.

Baboo Kalee Prosunno Dutt for Respondent.

A second attaching-creditor, whose claim to surplus proceeds had been disallowed by the District Judge, having appealed to the High Court, it was held that though it was in form an appeal against the judgment-debtor, it was in substance a question between rival creditors, and in such a matter no appeal could be heard.

Where the execution-sale has taken place, the second attaching-creditor and others are equally entitled, under Act VIII. of 1859, s. 271, to a rateable distribution of the surplus proceeds; no other than the first attaching-creditor having any right to have his claim satisfied in full.

Jackson, J.—This is an appeal against the order of the Officiating Judge of the 24-Pergunnahs made in execution-proceedings. These proceedings were in execution arising out of several decrees obtained against one Ootsubanund Shaha. It appears that the judgment-debtor had belonging to him a quantity of jute deposited in certain screw houses. The principal matter out of which this case arises was a quantity of jute attached firstly, by Chunder Sekhur Shah on the 7th May, and, secondly, by Jugobundhoo Shah on the 9th May. On the 15th of the same month, the vesting order was made, and the property vested in the Official Assignee, and the first attaching creditor, Chunder Sekhur Shah, was paid in full. The other creditor, Jugobundhoo Shah, thereupon says that he as the second attaching creditor, was entitled to have his claim likewise satisfied, so far as the surplus proceeds go, and this claim of his having been disallowed by the District Judge the present appeal is made. The learned counsel who appears for the appellant—who have not had the benefit of any argument on the opposite side—relies on a case in the Bombay High Court Reports, page 149, the case of Henry Gamble, Official Assignee against Bholageer Guru Mangir Gosain and others, which, he contends, recognizes the rights of subsequent attaching creditors after the first attaching creditor is satisfied. Now the first thing to be observed in this appeal is that, although it is in form an appeal by an execution-creditor against the judgment-debtor, it is in substance a question between rival creditors, one of those creditors, Jadu Lall Shaha, and indeed others also, having obtained decrees, and taken out executions previous to the order for distribution of the surplus proceeds. It has been frequently held in this Court that no appeal can be heard as between rival decree-holders. For that reason alone probably this appeal would fail, but, as the other point has been argued we think it right to give an opinion on the point. This question arises under section 271 of the Civil Procedure Code. The Code, while it expressly declares that the first attaching-creditor is to be satisfied

provides that the "surplus shall be distributed rateably amongst any other persons who, prior to the order for such distribution, may have taken out execution of decrees against the same defendant, and not obtained satisfaction thereof." It makes a distinction between creditors who have attached the property which has been sold, and the other creditors who have taken out execution. In the Bombay case the appeal before the High Court was not an appeal in execution-proceedings. It was a regular appeal from the judgment in a suit brought by the Official Assignee against various execution-creditors to try the question of their rights. Throughout the report there is nothing to show that any sale took place in execution, and, until the sale had taken place at the instance of the first creditor, it was uncertain what the rights would be; because, if the first creditor withdrew his claim, the second would be the first, and would be entitled to have his claim satisfied in full, and so would be the case with the other subsequent creditors. It seems to us that, where a sale had taken place, the second attaching creditors and others are equally entitled, under section 271, to a rateable distribution of the surplus proceeds, and that the section gives no right to any other attaching creditor than the first to have his claim satisfied in full. We think, therefore, that this appeal must be dismissed.

The 6th January 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Mesne-profits—Interest on Costs.

Case No. 296 of 1873.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Jessore, dated the 31st May 1873.

Gooroo Doss Roy (Judgment-debtor), *Appellant,*

*versus**

H. F. Stephens (Decree-holder), *Respondent.*

Mr. M. M. Ghose and *Baboo Becharam Mookerjee* for Appellant.

Baboo Bungshee Dhur Sen for Respondent.

Where a Subordinate Judge, in giving effect to a decree of Her Majesty in Council, ordered the restitution of the property which had been taken under a decree of the High Court, he was held to have done right in giving mesne-profits, although these were not expressly awarded by the Privy Council.

Interest was held to have been erroneously allowed on costs of proceedings in the Privy Council, where the decree of Her Majesty in Council was silent on the point.

Jackson, J.—This is an appeal arising out of execution-proceedings. The plaintiff brought a suit to recover certain property, and, by a decree of the Principal Sudder Ameen, he was declared entitled to a portion of that property. On appeal the High Court varied that decree, and declared that the plaintiff was entitled to the whole of that property. On further appeal to England, the decision of the High Court was reversed, and that of the Principal Sudder Ameen was restored. The order of Her Majesty in Council was in these words: "The decree of the High Court of Judicature at Fort William in Bengal of the 5th December 1864 be and the same is hereby reversed with £224-0-6 sterling costs, and that the decree of the Principal Sudder Ameen of Zillah Jessore of the 25th April 1864 be and the same is hereby affirmed with costs."

On this the Subordinate Judge, who now takes the place of the Principal Sudder Ameen of Jessore, in giving effect to the decree of Her Majesty in Council, ordered the restitution of the property taken by the plaintiff under the decree of the High Court with wassilat, and has also ordered that the defendant shall obtain interest on the costs, both of the Court of first instance and of the Privy Council; but he has disallowed the costs of the proceedings of the High Court as not being expressly awarded by the order in Council.

The plaintiff appeals, contending in the first place that there is no warrant for the Court in execution giving the defendant mesne-profits. A decision of this Court has been referred to, but it appears to us that this matter is in fact governed by the decision of the Judicial Committee in the case of Rajah Leelanund Singh *vs.* Maharajah Lakshmipat Singh.* The Judicial Committee there held that, although the decree had only ordered the delivery of the land, the mesne-profits flowed naturally therefrom, and this Court ought to have given them to the decree-holder, and it seems to follow that, on the same principle on which restitution takes place as to the lands erroneously given by the order of the High Court, the mesne-profits ought also to be given. As to the precise amount of the mesne-profits, we do not see that any adjudication has taken place, and

* 14 W. R. (P. C.) 23.

we do not think therefore that we have to consider that point. The plaintiff also complains that interest on costs of the proceedings in the Privy Council has been allowed, for which there is no provision in the decree. The respondent does not contest this point, and it is clear we think that, as the decree of Her Majesty in Council is silent on the point, the respondent is not entitled to any interest upon the amount. But, where he is ordered to obtain the costs of the proceedings in the Court of the Principal Sudder Ameen, there we think the ordinary rule in such cases should be followed, and as interest would run on the original decree, it must also run in execution.

As to the objection of the respondent under section 348, it appears to us that the Subordinate Judge misreads the order in Council when he says that "the order is "silent with regard to the costs incurred by "the decree-holder in the High Court." The order runs thus: "That the decree of the High Court, &c., &c., be and the same is hereby reversed with costs:" those costs are the costs of the Privy Council, "and that the decree of the Principal Sudder Ameen be and the same is hereby affirmed with costs." These words "with costs" must have some meaning. They could not refer to the costs of the Privy Council, because those costs had been already awarded specifically. They could not refer to the costs of the Principal Sudder Ameen's Court, because the simple affirmation of his decree carrying costs would be sufficient, and no special mention of the costs of that Court would be necessary. Those words "with costs" therefore must relate to the affirmation of the Principal Sudder Ameen's decree and the dismissal of the appeal against that decree, which the Judicial Committee declares would have been the proper order for the High Court to make, and the costs therefore given in that clause must be the costs of the proceedings in which the Principal Sudder Ameen's decree was first impugned, that is, the costs of the High Court in Bengal. We are bound to assign a meaning to the words "with costs," and we have done so; but we are not bound to go further and say that the costs must also include interest upon the costs. We therefore so far modify the decree of the Subordinate Judge as to declare that the defendant will be entitled to his costs of appeal to the High Court, but without interest, and we think that we ought not further to complicate these proceedings by allowing the costs of the present appeal.

The 8th January 1874.

Present:

The Hon'ble J. B. Phear and G. G. Mor
Judges.

Sale of Ancestral Property—Obligation of Pu chaser—Consolidation of Cases—Jurisdicti —Rights of Parties.

Cases Nos. 43 to 48 of 1873.

Regular Appeals from a decision passed the Officiating Judge of Tirhoot, da the 9th August 1872.

Soorendro Pershad Dobey (Pauper Plainti *Appellant,*

versus

Nundun Misser and others (Defendants) *Respondents.*

Baboos Aubinash Chunder Banerjee a *Hem Chunder Banerjee* for Appellant.

The Advocate-General, Mr. G. Greg Baboos Annoda Pershad Baner and *Nil Madhub Bose*, and *Moonsh Mahomed Yusuf* and *Abdool Baree* Respondents.

In justifying the purchase of ancestral property, purchaser is not bound to prove the fact that fa necessity actually existed; it is sufficient if establishes that he made *bond-fide* inquiry into matter, and was in that inquiry reasonably led to s pose that the necessity did exist.

When several cases are before a Court, and the s ject of suit and the defendants vary with each case, Court has no authority to order them to be tried as case against the will of the parties; and, without consent of all the parties, no such consolidation can effected by the Court as to make the evidence given any party in one case evidence in all the cases.

The parties to a suit which is being tried in a Co of first instance have a right to insist upon having the advantages which attach to a public hearing of whole case and the examination of all the witnesses open Court before the Judge who is to judicially det mine the matter in dispute between them, although th may, either expressly or impliedly, consent to the s being determined by a Judge who has not been prese throughout the trial, and to his taking into consider tion evidence which has not been given before him.

Phear, J.—THESE six cases have come to us under such circumstances, and their respective records are so imperfect, that we find ourselves unable to deal with them upon appeal. The principal facts of one of them, No. 43 of 1873, may be mentioned by way of illustration.

The property, which is the subject of su

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s originally property belonging to the intiff's grandfather. It passed by scent, under the Mitakshara Law, to the intiff's father, and has been obtained by Maharajah of Durbhungah, whose presentative the third defendant is, by virtue under colour of a sale made in execution a decree at the instance of one Ram al Misser against the plaintiff's father. e plaintiff alleges that, at the time of this ction-sale, the minor was a child, member ntly with his father of the joint family to ich the property in suit belonged under Mitakshara Law. And he says that, der these circumstances, the alienation ected at the auction-sale in execution of a sonal decree for money against his father ne passed no title to the defendant No. 3. The defendant, on the other hand, main- ned that the sale was had under such cumstances as gave the purchaser a valid e under the Mitakshara Law.

We ought to have said that the defendant d not admit that the plaintiff was, at the e of the sale, joint with his father in the joyment of this property.

In this state of the case, the first issue ich arose between the parties was this, mely, was the plaintiff, at the time when property, which is the subject of suit, s sold to the defendant No. 3, a joint mber with his father of a Hindoo family, titled in that capacity to the enjoy- nt and possession of this property as being perty of the joint family under the takshara Law? And, in the event of that e being found in the affirmative, the cond issue would be, was the sale to the fendant No. 3 effected in order to meet a ily necessity existing at the time of the sale? And we are of opinion that the affirmative this latter issue would rest upon the fendant; although no doubt a Court of uity would be bound to consider in his our that that affirmative is sufficiently tablished between the parties, if the fendant show that, at the time of the sale, made all reasonable enquiry relative to e existence of the necessity, and in the ourse of that enquiry obtained information hich reasonably led him to suppose that e necessity existed. In other words, it ould not be necessary for him, in order to pport the affirmative of this issue, to prove at facts of family necessity actually existed. would be sufficient if he establishes that made *bond-fide* enquiry into the matter, d was in that enquiry reasonably led to ppose that the necessity did exist.

The other cases, we are told, resemble the case No. 43 in their essential features. Now, the course which the Courts below have taken with regard to all these cases has been apparently (so far as we can understand what there occurred) to try them all together as if they were one case. We find an order in page 17 of the paper-book, in case No. 44, running in the following words: "As this "case, and cases Nos. 4, 5, 6, 7, 8, and 9, are "similar, it is deemed proper to proceed "with and try them together. Accordingly, "it is ordered that all the cases be simultane- "ously tried, and that a copy of this "proceeding be put up with the record of "each case."

It is not quite clear, upon the terms of this order, whether the Subordinate Judge who made it intended the seven cases, which are the subject of the order, to be tried as one case, or merely to be tried successively one after the other. Undoubtedly, inasmuch as the subject of suit and the defendants varied with each case, he had no authority to order them to be tried as one case against the will of the parties. And, although it seems, from subsequent proceedings, to be found in the different records that a partial amalgamation was attempted to be made of the cases, still there has, at the same time, been throughout a show of keeping them separate, because in several of the cases we find an application made by the plaintiff to have the evidence, which he had given in one case, taken as if it had also been given in the other cases. We infer from this that there was not, in fact at the outset, a consolidation of all six cases into one by consent of all parties, and, without such consent, no such consolidation could be effected by the Court as to have the effect of making the evidence given by any party in one case evidence in all the cases. After the order which has been referred to was made, the several suits appear to have come on for hearing before the Subordinate Judge, Baboo Grish Chunder Ghose, and witnesses were examined by that Judge continuously or in some continuity down to the 26th April 1872. When the case had got to that stage, for some reason or other which is not before us, the District Judge transferred all six cases to his own Court, and proceeded from that time to take the evidence of witnesses in the different cases; and he finally passed the judgment between the parties which has been appealed against.

Now it is hardly necessary for us to remark that the Judge could have no jurisdiction

whatever to take up and entertain a suit which was already being duly proceeded with and in the course of being tried and heard by the Subordinate Judge—a Court competent so to hear and determine it. He could only obtain power as between the parties to do so by their actual consent given expressly or impliedly. Even if there had been any doubt as to the law upon this point, it is obvious that it would be a proceeding pregnant with much risk of miscarriage of justice for a Judge against the will of the parties to take upon himself to decide a case in the first instance upon evidence which had not been taken before him, and he had not had the opportunity of hearing orally given, and while he had no means of knowing the attitude which the parties had taken up towards each other at the outset and during the first part of the hearing. The parties to a suit which is being tried in a Court of first instance have the right to insist upon having all the advantages which attach to a public hearing of the whole case, and the examination of all the witnesses in open Court before the Judge who is to judicially determine the matter in dispute between them; although, of course, they may, as no doubt often happens in this country, either expressly or impliedly, consent to the suit being determined by a Judge who has not been present throughout the trial, and to his taking into consideration evidence which had not been given before him. We have however no reason to suppose in the present case that the parties consented to the Judge taking this course. On the contrary, we find that it is one of the grounds of appeal preferred to this Court that the Judge did unlawfully transfer the cases from the Subordinate Judge's Court to himself, while they were actually in the course of being heard before the Subordinate Judge.

But the irregularities do not even end here, because we find that, of the evidence taken before the lower Court on the part of the defendants, some appears in some of the cases, some in others of the cases; and the Judge treated the whole of this material, thus scattered over six records, as if it was evidence given by the parties, and exhibited in each one of the cases. We have already stated that, so far as regards the plaintiff, it appears that an application was made to the effect that his evidence taken in one case should be used in all, and that an order was made accordingly. And we must assume that this was done with the consent of the parties defendants. But no order of this kind, indeed no application of this kin seems to have been made with regard to t defendants. The consequence is that now have six records before us, w regard to which we are perfectly unable satisfy ourselves to what extent the eviden scattered over the different records is p perly available and proper to be used each of the several cases.

We find further that the Judge founded a most important part of his conc sions of fact upon a considerable body documentary evidence which he says finds in the record. But we cannot disco that this documentary evidence, which he refers to, has been in any way proved at trial before either Judge, or in any admitted as between the parties in all or a one of the cases as evidence proper to used without proof.

Taking all these circumstances togeth we feel it impossible to go on with the fi trial of these appeals. It seems to us t there has been a complete miscarriage these cases in the Court below: and that the fault of the judicial officers, not of parties. Indeed, we are disposed to th that the defendant, at any rate, in the c No. 43, has been misled as to the part wh he had to play in the case by the t which the Judge has given to the mat We therefore are of opinion that there is other course open to us, but to reverse decision of the lower Court, and to send b the cases virtually for re-trial. They m go to the Subordinate Judge who had entertained them, and be taken up by h from the point at which the cases w removed by the Judge.

We think that the issues which have be stated above ought to be taken as issues rai in each of the different cases, and that evidence which has already been given both sides in the several cases, so far as can be attributed to them respectively, sho remain on the respective records. But, the same time, both parties must be at libe to adduce such further evidence on the issues as they may be advised to adduce.

We are reminded that, in one of the case *viz.*, No. 48, the defendant alleges that the pr perty was the self-acquired property of th plaintiff's father; and in that case, therefo the first issue for the defendant will b whether or not the property was the pro perty of the father as alleged.

Costs of this Court in all the cases mu abide the event.

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The 13th January 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

ppellate Courts of Co-ordinate Jurisdiction.

Case No. 1461 of 1873.

ecial Appeal from a decision passed by the Officiating Judge of Dacca, dated the 9th April 1873, reversing a decision of the Moonsiff of Moonsheegunge, dated the 28th November 1872.

Brojo Soondur Gossamee and another (Plaintiffs), *Appellants,*

versus

Juggut Chunder Dey (Defendant), *Respondent.*

Baboo Huree Mohun Chuckerbutty for Appellants.

Baboo Ashootosh Mookerjee for Respondent.

A District Judge has no authority, when hearing an appeal from a Moonsiff's decision, to vary or ignore the directions made by an Appellate Court of co-ordinate jurisdiction, such as that of the Subordinate Judge.

Jackson, J.—THE decision of the Lower Appellate Court in this case contains manifest and very serious error in the investigation. The plaintiff alleged the defendant to have been his gomashta, and sued for an account. The defendant thereupon denied that he ever acted as gomashta to the plaintiff. The plaintiff might not have been particularly well advised as to the mode in which he should prove his case, but he did produce copies of several plaints which, it was not denied, were filed by the defendant in his capacity of gomashta on which decrees were obtained. He also filed certain kabilas granted by the defendant in the same capacity. Now the defendant has in no way explained or accounted for his having acted on these several occasions, and we are bound to say, in the absence of such explanation, that these documents had most clearly proved that the defendant did act in the capacity of gomashta, and was bound when called to render the account. That being so, the decision of the Lower Appellate Court is erroneous, and the decree of the Moonsiff, that the plaintiff should have an account from the defendant, must be restored.

It is necessary to observe also that the District Judge, in hearing this appeal after remand by the Subordinate Judge of the District, seems to have thought himself at liberty to question, and dissent from the issues framed by the Subordinate Judge when the appeal was before him. In this respect, as to the hearing of an appeal from the Moonsiff's decision, the District Judge has no authority to vary or ignore the directions made by an Appellate Court of co-ordinate jurisdiction, and, if he were to do so, the greatest confusion would arise. A case might be remanded by the Subordinate Judge with certain directions, and the same case coming before the District Judge, an entirely different view might be taken, and neither the parties nor the inferior Courts would have any safe guide of action. The District Judge in such cases ought to be guided by the practice which obtains in this Court, where, when one Division Bench sees fit to give certain directions, any other Bench, before which the case may afterwards come on, has to keep itself within those directions.

The appeal will be decreed with costs.

The 19th January 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Louis S. Jackson, *Judge.*

Election—Damages—Wrongful Acts—Cause of Action—Alternative Claims.

Reference to the High Court by the Recorder of Rangoon and the Judicial Commissioner of British Burma (Judges of the Special Court of British Burma), under section 75 of "The Burma Courts Act, 1872" (Act VIII. of 1872).

Vytheelingum, *Plaintiff,*

versus

The Government, represented by the Deputy Commissioner of Amherst, and another, *Defendants.*

Plaintiff had purchased, at a Government auction, a license to vend spirituous liquors, paid the first instalment of the purchase-money, and demanded a license; but did not receive it until six days later. Meantime he opened a shop, and sold "tati" for three days, when the sale was stopped by the Extra Assistant Commissioner, notwithstanding plaintiff represented that he was a license-holder. The present suit was brought against the Government, represented by the Deputy Commissioner, for damages on account of wrongful acts of the Extra Assistant Commissioner, who was made 2nd defendant. The Judge, holding that, where a servant does a wrongful act maliciously, he is personally liable, and the master is free, left it to the plaintiff to say against whom he would proceed. Plaintiff elected to proceed against Government, and obtained a decree for a part of his claim.

In the Lower Appellate Court, the Judges were divided in opinion, the Recorder holding that the first Court was justified in allowing the plaintiff to abandon his suit against the 2nd defendant, to whom malice had been imputed, and that the suit was still maintainable against the Government; and the Judicial Commissioner considering it irregular to allow this action, inasmuch as the claims for damages on account of illegal and malicious acts of 2nd defendant and for damages for non-issue of license by 1st defendant, were inconsistent with each other:

HELD, by the High Court, that the view of the Recorder was correct. Nevertheless the plaintiff ought not to have been put to the option of abandoning his suit against one or other defendant, but the suit should have been tried out:

HELD, too, that the allegations against the two defendants were distinct, but not inconsistent, and that the Judicial Commissioner had taken too strict a view of the plaint.

Case.—THE point in question arose in an appeal from a decision of the Judge of the Town of Moulmein in a suit in which originally one Vytheelingum was plaintiff, and the Government, represented by the Deputy Commissioner of Amherst, was 1st defendant, and Nga Chaik, an Extra Assistant Commissioner in the same District, was 2nd defendant; but the suit was at an early stage dismissed as against the latter, and the point now in question is whether the suit having been dismissed as against Nga Chaik, it could, under the circumstances of the case, be continued against the 1st defendant, the Government.

The plaint (amended on a minor point) was filed against the two defendants above-named on the 24th of September 1872, having this heading: "Suit for Rs. 360 "damages sustained by plaintiff under the "circumstances hereinafter set forth owing "to the wrongful acts of the 2nd defendant, a "servant of 1st defendant." It then proceeded to show that a public auction for the sale of licenses to vend spirituous liquors, &c., for the official year 1872-73, had been advertised by the Deputy Commissioner of Amherst to be held on the 1st of April 1872; that at such sale plaintiff attended and purchased the right to vend "tari" in the Gyne Salween township; that, on the 3rd day of April 1872, he paid the first instalment of the purchase-money into the Bank of Bengal, in accordance with the conditions of sale, and demanded a license, but did not receive a license until the 9th of that month; that, on the 3rd day of April, plaintiff caused a "tari" shop to be opened in the village of Kadoe within the Gyne Salween township, and "tari" was therein sold on the 3rd, 4th, and part of the 5th of April; "that, on the "5th April, the 2nd defendant, who is an "Extra Assistant Commissioner in charge of "Gyne Salween township, illegally a "maliciously ordered that no more 'ta "should be sold in plaintiff's shop at Kad "that plaintiff informed the 2nd defend "that he was the license-holder, that he h "paid the first quarterly instalment, and t "he could not get his license granted h "owing to press of business in the office "the Deputy Commissioner, and plain "offered to give security for any loss t "might be sustained should the statem "not be correct, and asked the 2nd defe "ant not to stay the sale of 'tari,' m "especially at the particular time wh "there was a great gathering of people "witness a phongyee byan at Kad "Plaintiff also obtained a letter from "Superintendent of the Deputy Comm "sioner's office to the 2nd defendant, infor "ing him that plaintiff was the purcha "of the license to vend 'tari' in the s "township, and that he had paid the f "instalment of the purchase-money, but t "2nd defendant refused to withdraw h "order, and would not permit plaintiff "vend 'tari.' The sale of 'tari' was stay "in consequence thereof from about noon "the 5th to the afternoon of the 9th April."

The plaint then gives a calculation of t damages, averring that "by the illegal a "of the 2nd, who is 1st defendant's serva "plaintiff has sustained loss to the extent "Rs. 360;" and prays for a decree for t amount and costs.

By the consent of the advocates in t Court below, a preliminary issue, "Can t "defendants be sued jointly in the pres "case?" was first decided; and the Judg relying on a passage in Story on Agenc section 319, and other authorities, showi that, where a servant does a wrongful a maliciously, the servant is personally liabl and the master is free, gave his opinion th the case, as against one or other of t defendants, should be dismissed, and left it t the plaintiff to say against which he woul proceed. The plaintiff accordingly elect to proceed against the 1st defendant, th Government, and the suit as against the 2n defendant was forthwith dismissed wit costs.

The case then proceeded against the 1s defendant alone. Evidence was taken, the only suggestion of malice elicited by the Advocate for the Government being contained in these words of the plaintiff, when, under cross-examination, "I said that 2nd "defendant closed my shop from spite. He "took a jar of toddy from me when I

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urtaban, and, when I asked for payment, said he would take notice of me."

n the 10th of March 1873, the Judge of lmein gave judgment in favour of the ntiff as follows:—

"The only points that remain for decision the case are those arising on the 3rd, h, and 6th issues. The 3rd is was the n-issue of the license owing to plaintiff's n negligence? As regards this, it is ar that plaintiff did pay into the Bank Bengal on the 3rd April the first instalent of the amount for which he had ught the license, and that, as soon as that yment was certified to the Revenue ce, he was entitled, on application, to ceive permission to sell toddy. It is t quite clear when the payment was so rtified. Plaintiff says he is strongly of inion that he applied for his license on e day he paid the money; the clerk hose duty it was to issue the license says did not do so till the 5th; the license was t issued till the 9th. Plaintiff, it seems, d sell toddy at Kadoe on the 3rd and h, but was stopped by the Myooke, and d not resume his sale till the afternoon the 9th. It appears that, from the very cent publication of the Rules under the xcise Act, the sale of licenses under it, stead of taking place some 15 days before e commencement of the official year, took ace on the first day of that year. It also ppears that, owing to press of work, there as considerable delay in the issue of censes from the Deputy Commissioner's ffice after the payment of the money had een duly certified, and application for censes made; but it would seem from the vidence of the witness D'Castro, who is e Superintendent of the Deputy Comissioner's office, that the Deputy Comissioner had publicly said that, in consequence of the late date of the sale of censes, people, who had paid for them, ould be allowed at once to act under em, though the licenses themselves might ctually not be issued. Looking at this vidence, I think it is most probable that the clerk's statement is correct, as the plaintiff may not unnaturally have supposed hat, as soon as he paid his money into the Bank, he was entitled to open his shop, and, under the circumstances, have looked on that as a more urgent and pressing business than the formal taking out of the license. On the 5th, however, his sale was stopped. He knew that a Burmese festival was about to begin, and that, if he was not "permitted to sell during it, he would lose "money. He admits that he believes that, "if he had represented the facts to the "Deputy Commissioner, that officer would "at once have given him an order or *ad-* "*interim* license till the formal one could be "prepared and delivered to him. That "officer has recorded that, had the facts "been represented to him, plaintiff's case "would have received due consideration. "But plaintiff admits that he made no such "representation. The only explanation that "he can give of this is that of the four days "one was a Saturday, another a Sunday, "and that it was not usual for persons under "the circumstances to apply to the Deputy "Commissioner, but merely to the clerks. "But the whole circumstances of the case "were unusual—the late sale of the license— "it being impossible that plaintiff should "get a formal license by the beginning of "the official year—the shutting-up of his "shop because he had no license—the festival "occurring just at that time—were all "unusual circumstances which demanded on "the part of a man of ordinary prudence "unusual measures; and in so far as he did "not take the most obvious and direct mode "of averting the loss which he knew was "likely to occur, by applying to the Deputy "Commissioner immediately his shop was "closed, I think the non-issue of a license "was attributable to the plaintiff's own "negligence.

"The 5th issue was whether the defendants "or either of them were liable to plaintiff "for the loss incurred by plaintiff being pro- "hibited from selling toddy as set out in the "plaint. I have already decided that the "suit would not lie as against both defend- "ants, and I have therefore now merely to "consider how far the 1st defendant is "liable. The disposal of licenses under the "Excise Act is a matter which is entirely "in the hands and under the control of the "1st defendant. If the arrangements for "disposing of these licenses cannot be made "in due time, the 1st defendant must bear "the loss in so far as it was not wilfully or "negligently incurred by others. Now I "think on the facts there can be no doubt "that plaintiff was entitled to sell toddy on "the 5th April, and that he was prevented "from so doing from the want of arrange- "ment on the part of the 1st defendant to "meet the exigency of the case. On the "other hand, however, I see no reason to "suppose that, had plaintiff exercised "ordinary diligence to avert loss when he

"found his sale stopped, he could not easily "have had the matter rectified, and re-opened "his shop at latest on the afternoon of the "6th. I do not think that, under the cir- "cumstances, he was entitled to fold his "hands, and absolutely do nothing, and then "recover for the entire period his business "was stopped. It may be said that his "application to D'Castro for a letter was "doing something in the matter, but I think "it was taking a step in the wrong direction; "and plaintiff must have perfectly well known "that D'Castro, a mere ministerial officer, "had no authority to issue orders to those in "executive charge. I, therefore, on this "issue, find that 1st defendant is liable to "plaintiff for the loss incurred by the closing "of the plaintiff's shop for 1½ days.

"The last issue was what amount of "damage did plaintiff sustain? On this "point the evidence is far from satisfactory. "Plaintiff himself has admitted that the "estimation in his plaint is much exagger- "ated, inasmuch as he has calculated his loss "at the average gross receipt of Rs. 6 per "jar without deducting costs. The one wit- "ness produced loosely estimates the possible "sale in one day at Rs. 100, which would "give a higher total than even plaintiff's "exaggerated estimate; and I think on the "whole that Rs. 100 would be a fair "approach to the probable net profit the "plaintiff might have made during the 5th "and that part of the 6th April when his "shop was closed, and he was, through no "negligence of his own, prevented from sell- "ing. Finally, I may add that I have, in "consideration of the relative position of "the parties, allowed the plaintiff much "greater latitude than I should be inclined "to do under any other circumstances, but, "looking at the plaintiff's conduct through- "out—at his, when complaining to the "Deputy Commissioner and Commissioner, "being altogether silent as to the charge of "malice against the 2nd defendant, on "which he founded his plaint in this Court, "and at his subsequently electing to drop "that charge—I must say that I have consi- "derable doubt whether I was right in "giving him that latitude.

"*Order.*—Decree for plaintiff for Rs. 100 "with costs on that amount as against 1st "defendant."

Appeal was made to the Special Court; and the memorandum of appeal set forth among other grounds:—

1st.—"That plaintiff, in his amended plaint, "dated 24th September 1872, averred that "2nd defendant had illegally and ma "ously stopped his selling 'tari' until "obtained a license."

2nd.—"That the Judge, in his proceed "of the 11th February 1873, quoting 'S "'on Agency,' para. 319, held that a ma "was not liable for the wilful and malici "acts of his servant (see 'Story on Agen "sixth edition, para. 319, which is appl "ble to Government), and yet, instead "striking the Government (represented "Major Sladen) out of the case, gave "plaintiff one week to elect against wh "of the two defendants he would proceed

The Judges of the Special Court g their opinions separately as follow:—

Recorder of Rangoon.—"I think "the Judge of the Court below was justifi "in allowing the suit to be abandoned "to the 2nd defendant. If the plain "considered himself incapable of provi "the imputation of malice against "2nd defendant, the suit was still ma "tainable upon the cause of action alleg "(independently of such malice) against "1st defendant, the Government. "abandoning the suit as against the 2 "defendant, plaintiff abandoned the allegat "of malice. Thenceforth, the 1st defend "knew that the case to be answered "that the plaintiff had been illegally p "vented from selling toddy in accorda "with his license. The 2nd defend "being no longer a party to the suit, "allegation of malice was surplusa "Further, in my opinion, there is no grou "upon which it can be maintained that t "non-issue of a license to the plaintiff "sell toddy was attributable to the plaintiff "own negligence. I think, therefore, th "the conclusion of the Judge of the Co "below, that the plaintiff is entitled "damages against the Government, is su "stantially correct and that the appe "should be dismissed.

"(Sd.) F. HOUSMAN,

"*Recorder of Rangoon.*

Judicial Commissioner, British Bu ma.—"I do not think the Judge acte "regularly in allowing the action to proce "against the Government, the 1st defend "ant. In doing so he allowed the plaintif "to sue on a new cause of action. The "action as laid was for damages owing to "wrongful acts (illegal and malicious acts a "set forth in the plaint) of the 2nd "defendant, a servant of the 1st defendant, "and these illegal and malicious acts a

mainly in the plaint set forth to be the stopping of the sale of 'tari' in the plaintiff's shops. The suit, as it proceeded to judgment, was in reality for damages sustained owing to the non-issue of a license by the 1st defendant. The claims are not only entirely distinct, but they are inconsistent with one another. If the damages were caused by the non-issue of the license by the 1st defendant, the act of the 2nd defendant in stopping the sale was not illegal. If the damages were caused by an illegal and malicious act of the 2nd defendant in not allowing the plaintiff to go on selling, although he had no license, then they were not caused by the non-issue of the license."

"I quote from a judgment of the Calcutta High Court: 'The Judge, on the representation of the plaintiff, cannot alter the nature of the suit, or change the cause of action. This power (of amending the plaint) extends by means of a *vivâ-voce* examination to the elucidation of what is ambiguous in the claims of the contending parties, to the amendment of what is erroneous, and the supply of what is defective, but not to the conversion of a suit of one character into another inconsistent with, and that may be opposed to, it; and the issues, we apprehend, must be founded on the claim as brought on the plaint, and not on something, which the plaintiff, at some subsequent period, may prefer to consider as his cause of action, but which is altogether at variance with the relief prayed for in the plaint—6 Sutherland's Weekly Reporter (F. B.) 211.'

"In this case the Judge, though holding that, if the 2nd defendant acted illegally and maliciously, the 1st defendant was not answerable, or in effect, that the plaint as framed disclosed no cause of action against the 1st defendant, instead of dismissing the suit as against the 1st defendant, dismissed it against the 2nd, who alone could be held answerable on the plaint as framed, and allowed the suit to proceed against the 1st defendant without even requiring the plaint to be amended.

"I am of opinion that the plaintiff was bound by his statement in the plaint that the damages were sustained owing to the wrongful, *i. e.*, the illegal and malicious act of the 2nd defendant; and that this being so, he had no claim against the Government, and that the suit against the Government should have been dismissed, as urged in the second ground of appeal.

"(Sd.) J. D. SANFORD,

"*Judl. Commr., British Burma.*"

From the above it will appear that the Judges of the Special Court differed in opinion on this point: "Whether the fact, that the plaint contained an averment that the 1st defendant's servant committed the wrongful act complained of illegally and maliciously, was sufficient in itself to bar the suit against the 1st defendant?"

The point being one of law, and the Judicial Commissioner being of opinion that it should be referred to the High Court of Judicature at Fort William in Bengal, under the provisions of section 75 of the Burma Courts Act, 1872, we state, as above, the point on which we differ, and forward it with our respective opinions thereon, as set forth in our judgments, to the High Court.

The judgment of the High Court was delivered as follows by—

Jackson, J.—We are of opinion that the view taken by the late learned Recorder of Rangoon is correct, and that the judgment of the Court of first instance ought to be affirmed.

It appears to us indeed that the plaintiff ought not to have been put to the option of abandoning his suit against either the 1st or the 2nd defendant, but that the suit should have been tried out, and, after the evidence had been heard, the judgment of the Court should have been given against the party whose liability was made out.

But it does not appear that the plaintiff made any ground of appeal of the course taken, and the effect of dismissing the suit at once as against the 2nd defendant was, it seems to us, to strike out the allegation of malice which affected him alone, and to require from the plaintiff only the proof of such illegal or wrongful acts or omissions as would make the 1st defendant liable.

The allegations contained in the plaint against the several defendants were distinct, but not, we think, inconsistent; and although if malice were directly proved against the 2nd defendant, he alone might be liable, yet, on the plaintiff abandoning that allegation, or failing to prove it, he might be entitled to a verdict against the 1st defendant.

We think too strict a view of the plaint has been taken by the learned Judicial Commissioner, and this, we think, was not a case to which the observations cited from 6 Weekly Reporter apply.

The 20th January 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble C. Pontifex, *Judge.*

High Court Charter, s. 12—Jurisdiction—Maintenance—Appeal.

Appeal from an order passed by the Hon'ble A. G. Macpherson, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Radha Bibee (Plaintiff), *Appellant*,

versus

Mucksoodun Doss (Defendant), *Respondent.*

Messrs. Kennedy and *Branson* for Appellant.

Messrs. Lowe and *Phillips* for Respondent.

The widow of one A D applied under s. 12 of the Charter for leave to bring a suit in the High Court against the administrator of her husband's estate to have it declared that the maintenance allowed her was insufficient, and to have it enhanced and declared as a charge on the said estate. She prayed also for an account and the appointment of a Receiver. It appeared that all the moveable property and the greater part of the immoveable was in Benares; a portion only of the latter being within the Ordinary Original Civil Jurisdiction of the High Court.

The application was granted on 31st May 1873, leave being reserved to the defendant to move to have this order set aside. The plaint was then filed.

When the case came on for settlement of issues, the defendant questioned the jurisdiction of the High Court, and the Judge of the Court of Original Jurisdiction, who found that the defendant was in no way subject personally to its jurisdiction, withdrew the permission which had been granted to plaintiff to institute the suit:

HELD, in appeal, that, having acted on the order of the 31st May, plaintiff could not object to the validity of the reservation it contained:

HELD, too, that, as the parties and witnesses resided in Benares, there was no reason why the suit should be tried in Calcutta; and, as there was ample property within the jurisdiction of the Court at Benares to satisfy the maintenance, there was no necessity for its being declared to be a charge on the Calcutta property.

Quære.—Was the order appealed against, finally deciding that leave ought not to be granted to institute the suit in this Court, an appealable order?

THIS was a suit brought by the plaintiff, as the widow of Ojoodhia Doss, against the administrator to the estate of her deceased husband to have it declared that the sum of Rs. 100 a month given her as maintenance in the will of her husband was insuffici to have that amount raised to Rs. a month; to have such enhanced sum dec to be a charge on the moveable and imm able estate of her husband; and to h portion of the estate sold to provide for enhanced maintenance. The plaintiff prayed for an account of her husband's e and for the appointment of a Receiver. appeared that the whole of the move property to the value of Rs. 10,700 w Benares, and that of the immoveable prop the portion in Calcutta was estimated lakhs, and the portion in Benares, inclu the family dwelling-house, at 1 lakh 8,000 rupees. In the plaint, the plaintiff described as of "No. 8 Puggayaputtee S at Burra Bazaar in Calcutta," and the def ant as "of Shamohollah near Luckhey C tara, Benares." It appeared also from plaint that the plaintiff's husband "w Hindoo, subject to the Benares Schoo Law," and the plaintiff submitted "tha "could not legally and validly dispose o "property by will without making suffic "provision for the plaintiff as his widow, "that the maintenance of the plaintiff "charge upon the estate of the said Ojoo "Doss."

At the time of the presentation of plaint, the plaintiff applied by petition, u section 12 of the Charter, for special l to sue in this Court. In the petition it stated that "some portion of the imm "able estate of Ojoodhia Doss, decea "against which your petitioner claims "maintenance to be declared a charge, is p "in the town of Calcutta within the li "of the Ordinary Original Civil Jurisdic "of this Hon'ble Court, and partly out "the said jurisdiction."

Macpherson, J., made the following o on 31st May on this petition: "Be it s "reserving leave to the defendant to m "(when the case comes on for settlement "issues) to set aside this order."

The plaint was thereupon admitted settlement of issues, and was put on the file the Court.

The defendant, in his written statem among other contentions, stated that he d not and did not, at the commencement of t suit, carry on business, dwell, or pers ally work for gain within the Ordi Original Jurisdiction of the High Court, he submitted, therefore, that the plaintiff co not maintain this suit, and the High Co had no jurisdiction to hear and determ the same.

When the cause came on for settlement of ues, the question whether the Court had diction to entertain the suit was raised the defendant under the leave which had reserved, and Macpherson, J., then ered that "the leave granted to the laintiff to institute this suit in this Court e withdrawn, and that the plaint filed in is suit be taken off the file," and that "the laintiff do pay to the defendant his costs this suit to be taxed by the Taxing fficer on scale No. 2."

The judgment, on which that order was based was as follows:—

Macpherson, J.—When the plaint in this was presented, the plaintiff applied for cial leave (under section 12 of the Letters ent) to file it. Her application was nted, but subject to the reservation of ave to the defendant to move (when the se comes on for settlement of issues) to set ide this order." The defendant having so moved in pursuance of the leave rved, I have to say finally whether I k the case is one in which the Court ht to grant leave to sue here, when this rt has no personal jurisdiction over the endant, and a large portion of the pro- ty is not within the local jurisdiction. e defendant is admittedly in no way ject personally to the jurisdiction. In plaint he is described as living at nares. The plaintiff's husband was a nares man; and the object of the present is to establish the plaintiff's right to intenance out of his estate. The only und on which it is supposed this Court any authority to deal with the matter is a portion of the immoveable estate is in lcutta, and that the plaintiff asks for a claration that her maintenance is a charge her husband's estate. The only pretence jurisdiction is the prayer for this declara- n.

The plaint states that the income of the tate is Rs. 18,000 a year, or thereabouts: d there is no allegation or even suggestion waste.

In such a case it seems to me that the re fact, that the widow chooses to come e and pray for a declaration that her right maintenance is a charge on the property ich is in Calcutta as well as on that which sewhere, does not give the Court any cient reason for granting leave to sue . Without questioning the cases which de that a widow's maintenance may be ated a charge on her husband's estate, doubt very much whether she has any right of suit for the mere purpose of obtaining such a declaration where there is no allegation by her of waste, or that the estate is insufficient. The real object of the present suit is to establish her right (under the circumstances which have occurred) to any maintenance at all; and the prayer for a declaration of its being a charge on the estate is merely collateral, and inserted for the purpose of giving the Court a shadow of an excuse for receiving the plaint, instead of remitting the plaintiff to what is really the proper Court.

I think I have no power to allow this suit to be brought here. But, if I have the power, I think that I ought not to give the leave asked for. Therefore the leave is withdrawn, having been granted subject to re-consideration of the order when the defendant should come in and claim to be heard. The plaint is to be taken off the file, and the plaintiff must pay costs on scale 2.

The plaintiff appealed from this judgment on the following grounds:—

For that the learned Judge held that this Honorable Court had not jurisdiction to entertain this suit, whereas he ought not so to have held.

For that the learned Judge held that this Honorable Court had not jurisdiction to give leave to bring this suit therein, whereas he ought not so to have held.

For that the learned Judge held that the leave to bring this suit in this Honorable Court having been given, such leave might, on the settlement of issues, be recalled, whereas he ought not so to have held.

For that the learned Judge ordered the plaint in this suit to be returned to the plaintiff, whereas he ought to have heard and determined this suit.

For that the learned Judge ordered the plaint in this suit to be taken off the file, no notice of motion for the purpose having been served.

The judgment of the Appellate Bench was delivered by—

Couch, C.J.—I think it is not open to the appellant to contend that Mr. Justice Macpherson had no right to recall the leave which he gave to bring the suit in this Court by the order made on the 31st of May 1873. The plaintiff acted upon the order which was made in the terms stated, "reserving leave to the defendant to move "(when the case comes on for settlement "of issues) to set aside this order."

Upon that the plaint was filed, and what I understand by this order is that the

learned Judge did as was a convenient course of proceeding. Instead of deciding absolutely, upon the application of the plaintiff without hearing the defendant, he postponed his final decision until an opportunity had been afforded to the defendant to state any objections he had to the leave being granted. I think, having acted upon this order, the plaintiff cannot object to the validity of the reservation.

But it may be contended that it is carrying out the intention of the learned Judge if we consider that his order made upon the settlement of issues, setting aside the previous orders, and deciding that the leave ought not to be granted, is in the same position in regard to the right of appeal as if it had been made on the 31st of May.

The case is this: Mr. Justice Macpherson has exercised his discretion by finally deciding that leave ought not to be granted. I will suppose that there is an appeal to this Court upon that. It is not necessary to determine whether an appeal lies or not, because, in my opinion, this is not a case in which we ought, in the exercise of our discretion, to give leave to sue in this Court. The main question in the case, whether the plaintiff is entitled to the amount of maintenance which she claims, would, it seems to me, be much more conveniently tried in the Court of Benares, where the defendant resides, where the plaintiff apparently also resides, and where all the witnesses who will be called to give evidence in the suit probably also reside. There is no reason that question should be tried in Calcutta, so far away from the residence of all the persons who would have to appear in Court.

The law also which would have to be applied is the law which is current in Benares, with which the Courts there are quite as familiar as the Judges of this Court can be.

It is said that the suit ought to be tried here, because the plaintiff asks that her maintenance may be declared to be a charge on the Calcutta property, which the Court at Benares could not declare, and that the plaintiff also asks to have a Receiver appointed for the Calcutta property, which could not be done by the Benares Court. There does not appear to be any necessity either for declaring the maintenance to be a charge on the Calcutta property or for the appointment of a Receiver. There is apparently, within the jurisdiction of the Court at Benares, ample property to satisfy the maintenance; and, unless it is shown that there is a probability that, if a dec maintenance was obtained in the Court, the payment of it could not be e except by making it a charge on the C property and appointing a Receiv ought not to allow the suit to be bro this Court. It seems to me that the Court to try the suit is the Court at B and, if I had been called upon in t instance to decide the question, Justice Macpherson was, whether ought to be granted, I should have d that it ought not.

The appeal must be dismissed with

Pontifex, J.—I am quite of the opinion.

The 20th January 1874.

Present:

The Hon'ble F. B. Kemp and F. A. C *Judges.*

Misjoinder.

Reference to the High Court by the siff, exercising the powers of a J the Small Cause Court at Sera dated the 11th August 1873.

Baroo Sircar, *Plaintiff,*

versus

Massim Mundul and others, *Defend*

It is illegal to join different causes of actio suit against different parties where each has a and separate interest, *e. g.*, to bring a joint actio price of timber against defendants who purcha one pair of timber, from the plaintiff, separat the other.

Case.—In this case the plaintiff ha to recover the value of some timber the defendants on the allegation that th chased those timbers from him on credi have left the purchase-money unpaid..

The defendants have advanced se defences against the claim. They u mously urge that they purchased no t from plaintiff, but defendant No. 1 that he purchased one piece of timber a third party, to whom he paid the price.

In course of the hearing of the plain evidence in this case, it has appeared t defendants separately purchased one pai timber each, from plaintiff, at Rs. 8 per p Plaintiff's witnesses state that each of defendants purchased one pair separat from the other, though the purchase made at the same time. It is now urged

f the defendants, though this plea
t taken earlier, that the plaintiff's
e having disclosed a misjoinder of
f action, his suit is liable to dismissal.
onsideration of the evidence, it has
d to me that each defendant separately
ed one pair of timber from the plaint-
gh the purchases were made at one
same time, and consequently it is
at the cause of action that the plaintiff
inst one defendant is quite distinct
t which he has against the other, and
e defendants are not concerned in
n with both of them; one defendant
ontract with plaintiff for one pair, and
er defendant for the other, and hence
contracted separately with each only
t pair that was taken by him. Under
rcumstances, I am of opinion that the
uses of action existing separately
two different persons have been joined
suit, and this fact renders the case
the charge of misjoinder, which has
eld by the High Court on several
ns as making a suit liable to dismissal.
rgued for plaintiff that, as the contracts
ade by the defendants at one time,
nvenience can arise to them on the
ing decided in plaintiff's favour, if a
e decree be passed against each of
r the value of the timbers taken by
But this argument is not supported
precedent at all, and the question is
ther any inconvenience would result
defendants, but whether two distinct
f action against two different defend-
n be joined in one action. As such
f separate causes of action against
t parties, who are not interested in
n with them, is not compatible with
rit of the Procedure Code and the
rulings of the High Court, I am of
that this argument raised in plaint-
vour cannot be countenanced. The
n being a very important one, and
o arise in future in similar cases, and
tion being involved in much difficulty,
the sanction of the opinion of the
able High Court of Judicature, and I
the same under Section 22 of Act
of 1865 to the opinion of their Lord-
ps the Honorable Judges of the said
urt. The question which I beg to submit
whether defendants having purchased each
pair of timber from the plaintiff sepa-
ely from the other, the plaintiff can bring a
t action against them for their price. I
of opinion, for reasons above stated, that
joint suit is improper and open to the charge of misjoinder, and, as such, cannot be allowed to succeed.

I therefore dismiss this suit with costs and interest, contingent upon the opinion of the Honorable High Court.

The judgment of the High Court was delivered as follows by—

Kemp, J.—We concur with the Moonsiff with powers of a Small Cause Court Judge. It is illegal to join different causes of action in one suit against different parties, where each of these parties has a distinct and separate interest, as is the case in the suit referred for our opinion.

The 20th January 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Rent-suit—Res Judicata—Jurisdiction—Act VIII. (B. C.) of 1869.

Case No. 1304 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 28th April 1873, affirming a decision of the Moonsiff of that District, dated the 27th May 1872.

Mohima Chunder Mojoomdar and another (two of the Defendants), *Appellants,*

versus

Asradha Dossia (Plaintiff), *Respondent.*

Baboo Rash Beharee Ghose for Appellants.

Baboo Bungshee Dhur Sen for Respondent.

The decision of an ordinary Civil Court in a suit for rent cognizable under Act VIII. (B.C.) of 1869 is binding in a subsequent suit between the same parties which raises the same question in a different form.

Jackson, J.—This case appears to us to be very clear. The appellants before us, who were defendants in the Court below, sued the respondent for rent. That suit was brought under Act VIII. (B.C.) of 1869 in the Court of the Moonsiff, and the respondent set up the defence that the land was lakhiraj. Thereupon the Moonsiff inquired into that plea, and found that the land was not lakhiraj, but mâl, and he gave the plaintiffs in that suit a decree. This decision was appealed against in the Court of the District Judge, where the decision was affirmed. The defendant in that case has now brought the present suit against the

then plaintiffs who are now the appellants before us, for a declaration of his right to hold the lands lakhiraj, that is, free from the payment of rent. The first issue raised in the Court of first instance was whether the suit was barred by section 2, Act VIII. of 1859. The Moonsiff held that the suit was not so barred. The same question was raised in similar terms before the District Judge, and he also held that the section was no bar to the suit. The Judge observes: "Although, in the litigation of 1861, the "question whether the land is lakhiraj or "mâl was not distinctly tried, there is no "doubt that it was tried in the late litiga- "tion when the defendant sued plaintiff for "rent, and got it on the ground that the land "is not lakhiraj, as defendants allege, but "mâl, as plaintiffs declare. That suit was "tried under the new Rent Act by a Moonsiff "whose decision was upheld on appeal by "the District Judge, and the procedure "under that Act is ordinarily the same as "under Act VIII. of 1859. I have no doubt, "however, that the Moonsiff was right in "holding the present suit not barred, because "there is a difference in the causes of action, "and a bar must be made out very clearly. "The purposes of the two suits are different: "In the former suit the defendant wanted "rent, and for the purpcse of deciding that "the question of title was incidentally tried, "but only for the purpose of deciding the "question of rent. I have no doubt that as "a decision on title by a Revenue Court pro- "nounced in a rent-suit is binding only in "the rent-suit, so this decision of title, though "by a Civil Court, having been pronounced "in a rent-suit, and merely with the object "of deciding as to the rent of certain years, "leaves it open to plaintiff to sue to obtain."

We should observe that the question really raised between these parties did not refer to any bar under section 2 of the Civil Procedure Code, but it was whether the present plaintiff, having had the issue now raised fairly tried in the Court of the Moonsiff and in the District Court on appeal, is entitled to raise the same question in a different form in the new suit brought for that purpose. It was lately a subject of doubt whether the previous decision upon such a point, even of a Revenue Court, would not be binding. That doubt has been set at rest by the ruling of the Full Bench in 19 Weekly Reporter, page 322, where it has been declared that the decision of the Revenue Court is not binding. It will be observed, however, that the decision of the Court in that case is shown in the words all the Judges, who gave separate judgm to have proceeded entirely upon the limit and exclusive character of the jurisdict of the Revenue Courts. In the case bef us, the previous decision was not obtain in the Court of the Collector. It was decision of the ordinary Civil Court of t country, and, although the subject-matter that first suit was a claim for rent, it ca to be cognizable under Act VIII. (B.C.) 1869. The Court tried that suit with all power as a Civil Court, and had t jurisdiction to dispose finally of all questi arising before it in the course of the tr That being so, we think the observatio of the Judicial Committee in the case Soorjo Monee Dayee *vs.* Sudanund Mo pattur, 20 Weekly Reporter 377, fu apply, and that the plaintiff in this s is not entitled to vex the defendants raising again in a new suit the very s question which was once decided by a Co of competent jurisdiction in a previous s We think, therefore, the decisions of t Courts below should be set aside, and plaintiff's suit dismissed with costs.

The 24th January 1874.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, C *Justice*, and the Hon'ble F. B. Ke Louis S. Jackson, F. A. Glover, and Pontifex, *Judges*.

Suit for Rent—Alternative Claim—Issues Amendment of Plaint.

Case No. 1899 of 1872.

Special Appeal from a decision passed the Subordinate Judge of Furreedp dated the 8th August 1872, affirming decision of the Moonsiff of Bhang dated the 3rd May 1872.

Lukhee Kant Doss Chowdhry (Plaintiff), *Appellant*,

versus

Sumeerooddi Tustar and others (Defendant *Respondents*.

Baboos Kalee Mohun Doss and *Kashe Kant Sen* for Appellant.

Baboos Sreenath Doss and *Anund Gop Palit* for Respondents.

Where a landlord sues a ryot for arrears of rent alleged to be due under a kubooleut, and the Court in

d

such kubooleut has not been executed by the ryot, it appears, notwithstanding, that the ryot occupied land under the zemindar, the landlord's right to a further trial of the question, whether any rent, how much, is due, will depend upon the claim stated the plaint. If that claim is in the alternative, and ryot thus has notice that, on failure to prove the ooleut, the landlord will claim rent for the occupation e land, the landlord is entitled to have that issue But, if a claim for rent on account of such occuy is not in the plaint, the landlord is not so entitled.

is in the discretion of the Court to amend the plaint e issues, and, where the omission has been from vertence or mistake, it would generally be proper so.

is case was referred to the Full Bench, the 28th July 1873, by Jackson and Dwarkanath Mitter, JJ., with the following remarks:—

Jackson, J.—We are under the necessity referring this case for the judgment the Full Bench. The question which uires to be settled by an authoritative ing is whether a landlord having sued ryot for arrears of rent alleged to be due der a kubooleut, and the Court having nd that such kubooleut had not been cuted by the ryot, but it appearing, notthstanding, that the ryot occupied the land der the zemindar, whether the landlord is titled to have a further trial of the question whether any rent, and how much, is due account of the ryot's occupation of such nd. It has been held that, in such circumnces, the landlord is entitled to recover rent which appears to be due to him erwise than under the kubooleut, in veral cases, one in Sutherland's Reports for 64, page 12, Act X. Rulings, another in Weekly Reporter, page 81, another in Weekly Reporter, page 233, and in a ill more recent case, in which a similar inion appears to have been expressed, hough the case is not yet reported, by e present Chief Justice in Special Appeal o. 945 of 1872, decided on the 14th May 73.* On the other hand, we have repeated lings in Marshall's Reports, pages 560, 7, 263, 57, and 23, and in 12 Weekly eporter, page 317.

The judgment of the Full Bench was delivered as follows by—

Couch, C.J.—"The question referred is whether a landlord having sued a ryot for arrears of rent alleged to be due under a kubooleut, and the Court having found that such kubooleut had not been executed by the ryot, but it appearing, notwithstanding, that the ryot occupied the land under the zemindar, the landlord is *entitled* to have a further trial of the question whether any rent, and how much, is due on account of the ryot's occupation of such land."

Whether the landlord is entitled to this or not depends, in our opinion, upon the claim which is stated in the plaint. If the claim is in the alternative, and thus the ryot has notice that the landlord, if he fails to prove the execution of the kubooleut, will claim rent for the occupation of the land, we think an issue ought to be framed to try whether any rent, and how much, is due on account of the occupation, and that the landlord is entitled to have that issue tried. If any rent is due, the landlord ought to be allowed to recover it. It is not forfeited by his making a false claim upon a kubooleut, and he should not be made to bring two suits, when the questions between him and the ryot can be determined in one.

But, where a claim for rent on account of the occupation of the land is not made in the plaint, we think the landlord is not entitled to have the question tried whether any, and how much, rent is due. "The determinations in a cause should be founded upon a case either to be found in the pleadings, or involved in, or consistent with, the case thereby made."—Eshan Chunder Singh *vs.* Shama Churn Bhutto, 11 Moore's I. A. 20.* "The state of facts and the equities and ground of relief originally alleged and pleaded by the plaintiff are not to be departed from."—*Ib.* 24.

It is in the discretion of the Court to amend the plaint or the issues, and to allow it to be tried. And, where the omission to make the claim in the plaint appears to have been from inadvertence or by mistake, it would be proper to do so. "If, by inadvertence or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute."—Hunooman Persaud Pandey *vs.* Mussamut Babooee Munraj Koonwuree, 6 Moore's I. A. 411.

But, where there is reason for thinking that the omission was deliberate, it would generally not be proper.

The landlord may then be justly left to bring a fresh suit, and to lose any part of the rent the suit for which would be barred by the law of limitation. This appears to be the opinion of the High Court at Bombay,

* Since reported at 20 W. R. 64.

* 6 W. R. (P. C.) 57.

9 B. H. C. Reports 1. When a Court of first instance, in the exercise of its discretion, allows the question to be tried, the reason for doing so should be distinctly stated. An arbitrary exercise of the power might be a ground of appeal. In the suit in which this reference has been made, the landlord was clearly not entitled to have the question tried. An issue raising it had, indeed, been framed by the first Court, but the issue, whether the co-sharer ought to have been made a defendant, was decided in favour of the landlord, on the ground that his suit was based on the kubooleut. The two claims could not be properly joined in the suit, as upon the second claim other persons ought to have been made defendants.

We wish also to remark that, where, as in Special Appeal No. 945 of 1872,* the defendant admits a sum to be due for rent, the Court may rightly, in our opinion, give a decree for it, irrespective of the claim made in the plaint. This is all that was decided in that case. It was there said by the pleader for the appellant, in a general way, that there were decisions in Marshall's Reports against this being done, but the references to them were not given, and it now appears that none of the decisions go so far as this.

We think in this appeal the question put to us should be answered in the negative, and the appeal should be dismissed with costs.

The 24th January 1874.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, Louis S. Jackson, F. A. Glover, and C. Pontifex, *Judges*.

Appellate Court—Arbitration.

Case No. 805 of 1871.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 25th March 1871, modifying a decision of the Subordinate Judge of that District, dated the 25th January 1870.

Juggeshur Dey (Defendant), *Appellant*,

versus

Kritartha Moyee Dossee (Plaintiff), *Respondent*.

* 20 W. R. 64.

Baboo Rash Beharee Ghose for Appella

Baboo Bama Churn Banerjee for Respondent.

An Appellate Court has no power, under the Co Civil Procedure, to refer a case to arbitration eve consent of the parties.

This case was referred to the Full Be on the 18th September 1873, by Jack and Glover, JJ., with the follow remarks :—

Glover, J.—The substantial point decision in this appeal is whether an Ap late Court has power, on the consent of parties, to refer a case to arbitration.

In Russool Bibee *vs.* Shaikh Jan Chowdhry, 17 Weekly Reporter 31, wh I was one of the Judges, it has been re that an Appellate Court has such po and, after full consideration, I am still of same opinion.

I was at first somewhat doubtful as to enunciation of the principle, chiefly on grounds :—

First, that where an Appellate Co referred a case to arbitration, it would b first to reverse the decision of the Co below, and then make the reference, in wh case there would have been a "final ju ment" passed in the case, which wo under section 312 of the Procedure Co have prevented the reference.

And, *secondly*, that, where the lo Court's order was not formally reversed the Judge, the result of the arbitration mi be to set aside the decision of the C Court, a proceeding which seemed to me be without authority.

But these difficuties are, I think, remo by the consent of the parties, and th consent to have a case tried in a particu way takes, I think, the matter out of purview of the Act, so far as procedure concerned.

The question, however, is not witho difficulty, and I am quite willing to refer for the authoritative decision of a F Bench.

Jackson, J.—I think the matter should referred for the decision of a Full Bench, it seems very doubtful whether the provisio of the Code contemplated a reference arbitration after decree in the Court of instance.

The following are the judgments of t Full Bench :—

Couch, C.J.—In this case, a suit ha been brought for the recovery of money

stment of the accounts of a shop, the
n being laid at Rs. 4,500, the Subordinate
ge of East Burdwan made a decree by
ch he awarded to the plaintiff a certain
unt, being a part of his claim, and dis-
ed the remainder. From this there was
ppeal to the Officiating Judge. It appears
the case was referred by that Court to
ration, and an award having been made,
Officiating Judge made a decree in the
s of it. An application had been made
im to set the award aside, which was
ed.

he special appeal is from this decree,
the ground taken in it is that the reference
rbitration could not legally be made.

he appeal having been heard before a
sion Court, consisting of Mr. Justice
son and Mr. Justice Glover, that ques-
has been referred to a Full Bench.

he power to refer suits to arbitration is
ained in section 312 of Act VIII. of
9 and the subsequent sections. It is
r these sections that the Lower Appellate
rt has acted, having made a decree in
terms of the award as directed by
on 325.

ection 312 says: "If the parties to a suit
e desirous that the matters in difference
tween them shall be referred to the final
cision of one or more arbitrator or arbi-
tors, they may apply to the Court at
y time before final judgment for an order
reference."

his section is in the part of the Act
ch relates to the proceedings of the
inal or primary Court, and the words
al judgment" here appear to me
oubtedly to mean the final judgment of that
rt, the word "final" being used to dis-
uish the judgment from a preliminary
interlocutory one. "Final" here does
mean the final judgment in the suit from
ch there can be no appeal, but the final
gment of the Court in which the suit is
ught. And this section does not itself
ly to a Court of Appeal. We shall see
ther there is anything in the Act, or in
subsequent Act, which will make it
ly; but, looking at the section alone, it
s not appear to me to do so.

hen section 315 says that "the Court
all, by an order under its seal, refer to
e arbitrator or arbitrators the matters in
ifference in the suit which he or they may
e required to determine." The word
all" appears to me to be imperative
n the Court. If the parties agree to
, and properly nominate arbitrators,
the Court has no discretion in the matter. It is not a power which the Court may or may not exercise as it thinks fit; but the Act confers, upon the parties agreeing to arbitration, the right to have the reference.

Section 317 says that, when the reference is made to arbitration by an order of the Court, "the Court shall issue the same pro-"cesses to the parties and witnesses whom "the arbitrator or arbitrators may desire to "have examined," &c. That again appears to me to be imperative upon the Court, and not a mere discretionary power which it may or may not exercise. In section 325 provision has been made for remitting the award to the arbitrators for re-consideration, and it is provided that, if no application is made to set aside the award, or if the Court shall have refused the application, the Court shall proceed to pass judgment according to the award, or according to its own opinion on the special case if the award shall have been submitted to it in the form of a special case. That appears to me to give to the parties, who have referred a suit to arbitration when an award has been made, a right to have a judgment passed by the Court according to the award. All these sections show that it is something more than a mere power in the Court to refer. It is a right to which the parties have, if they think fit, to exercise it.

I have said already that these sections apply to the Court in which the suit is brought, the primary or original Court. They can only be made applicable to a Court of appeal by section 37 of Act XXIII. of 1861, and I think that section does not make them applicable to it. It provides that, "unless when otherwise provided, the Appel-"late Court shall have the same powers in "cases of appeal which are vested in the "Courts of original jurisdiction in respect "of original suits."

This does not appear to me to be a power within the meaning of that section. It is an enabling clause giving to the Appellate Court various powers which may be exercised by Courts of original jurisdiction; but, for the reasons I have mentioned, I think referring to arbitration does not come within the meaning of the word "power." If it were intended that the Appellate Court should be bound to refer a case which came before it to arbitration, when the parties agree to do so, the intention of the Legislature would have been more clearly expressed.

And, if there were any ambiguity in the meaning of the word "power," and it were

doubtful whether it might not be construed to include reference to arbitration, I think we should consider that neither reason nor convenience requires that the Appellate Court should refer a suit to arbitration in that way. It would enable the parties to it, by agreement between themselves, to refer to the decision of arbitrators chosen by themselves, the propriety (it might be on a question of law) of a decision of one of the Courts (perhaps not the High Court, as the Act does not now apply to the High Court so as to be imperative), it would enable the parties to agree to substitute, as a decree in an appeal from the decision of a District Judge or a Subordinate Judge, the opinion of arbitrators appointed by themselves. I think this would not be either reasonable or convenient; and if there were a doubt as to the meaning of the word "power" in section 37, I should hold that there was a good ground for not giving to it a construction which would impose upon the Court of appeal the obligation to refer a suit to arbitration.

The decision of the District Judge having proceeded entirely upon the ground that these sections in Act VIII. of 1859 applied to the Appellate Court, and he having passed a decree under the authority given by them, I think the decree must be set aside, and the suit must be remanded for re-hearing. The costs will follow the result.

Jackson, J.—I concur.

Kemp, J.—After hearing the judgment, which has just been delivered by the learned Chief Justice, any doubts I may have had upon this subject are entirely removed. The people of this country should be encouraged, as much as possible, to refer their differences to arbitration. That is a method of deciding disputes which is very frequently resorted to in this country, and it is one which is familiar to the people of the country, and is consonant with their customs and habits, and I think it is very desirable that as little restriction as possible should be placed upon references to arbitration; but, as pointed out by the Chief Justice, if parties are allowed to refer matters to arbitration after a case has been finally disposed of by a Court of justice, such a proceeding might tend to bring the lower Courts into contempt.

On the whole, therefore, I concur in the judgment delivered by the Chief Justice.

Glover, J.—I also concur. When this reference was made, I was inclined to think that the consent of the parties got rid of the difficulty, and that a reference could be had to arbitration, notwithstanding the case had got to the appellate stage; but, further consideration, and I may add hearing a fuller argument, I am do as to the correctness of my first impre at all events, I am not prepared to d from the judgment which has just been vered by the Chief Justice.

Pontifex, J.—I entirely concur in judgment pronounced by the learned Justice.

The 24th January 1874.

Present:

The Hon'ble J. B. Phear and G. G. M
Judges.

Mesne-profits — Limitation — Execution — XIV. of 1859, s. 20.

Case No. 321 of 1873.

Miscellaneous Appeal from an order p by the Subordinate Judge of Patna, the 5th July 1873.

Mussamut Fuzeelun (Judgment-debtor
Appellant,

versus

Syud Keramut Hossein (Decree-holder
Respondent.

Moonshee Mahomed Yusuf for Appella

Mr. C. Gregory and *Baboo Boodh Sen Singh* for Respondent.

Act XIV. of 1859, s. 20, applies only to such dec orders as are complete in themselves, and ready t enforced, and not to so much of a decretal order directs proceedings to be taken in order to assess amount of wassilat to be recovered by the judgm creditor, which are merely a prolongation of the t and not proceedings to enforce the decree.

Phear, J.—In this case the judgme creditor obtained his decree in 1862 possession of certain land, costs, and wass Various proceedings seem to have be taken at different times to obtain execut and also assessment of wassilat, the la commencing with the petition made on t 28th July 1870; and possession was fu obtained in 1866, and all money due

and interest under the decree was paid e 23rd May 1871. At that date also nderstand that there was something n entry of satisfaction in full of the e made matter of record. But, after- , an application was made by the judg- -creditor to carry on the investigation e amount due in respect of wassilat. een 1870 and the entry of the satis- n in May 1871, there had been some taken in this direction, and a good witnesses examined. But, when the nt application was made to resume the iry into the wassilat, the judgment- r objected that the proceedings were d. The lower Court has held that are not barred. And on this point we that the lower Court is right.

e truth is that proceedings after a decree, pending the matter of execution, taken the purpose of assessing wassilat, are pendent of the decree, at least in this ect, namely, that they are not taken by of obtaining satisfaction of the decree, are merely carried on in pursuance of order which was made at the time of ing the decree to the effect that wassilat ld be assessed or estimated in the course e execution-proceedings. The decretal er may be considered as of two parts, which was final and in reality a decree possession and for money, and that h was incomplete, namely, the award such damages as should be afterwards ssed pending the execution-proceedings. ow the section of the Limitation Act ch limits the time within which exe- ion of a decree is to be sought is the h section of Act XIV. of 1859. It runs the following words: "No process of execution shall issue from any Court not established by Royal Charter to enforce ny judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution."

It appears to us that this enactment pplies solely to such decretal orders as are mplete in themselves, and ready to be *forced* by process of execution at the tance of the person in whose favour they made against his opponent. It does not ply to so much of a decretal order as ects proceedings to be taken in order to ess the amount of wassilat which is to recovered by the judgment-creditor when is assessed. Proceedings of this kind are merely a prolongation of the trial of the suit itself. And indeed in very many cases the assessment of the wassilat might well enough be proceeded with during the actual trial of the matter of suit, and completed by the time that the decree, on the merits of the case, is passed. So that, until these proceedings are ended by a final assessment of damages in the shape of wassilat, there is no decree or order in respect of wassilat which is capable of being enforced in execution by the judgment-creditor against his judgment-debtor. Thus, there is no bar to proceedings for the assessment of wassilat being carried on at any time, arising out of the enactment of section 20, Act XIV. of 1859.

On the other hand, taking the view that they are in themselves of the nature of a trial, and that they constitute a continuation of the suit between the parties, it seems to us that they ought always to be instituted promptly—at the latest within a reasonable time after the date on which possession is obtained by the judgment-creditor, and then pursued diligently without any unnecessary break as all other proceedings *inter partes* in a Court of justice ought to be pursued. In these, as in the case of a trial of a regular suit, if either party, upon being duly summoned to appear and prosecute the proceedings in Court, fails to do so, the proceedings ought to be terminated by the Court for default, and not again resumed. In the present instance, the lower Court, which was charged with the duty of carrying on the investigation into wassilat, has thought that there was no reason why the judgment-creditor should not be allowed, even at the very late stage which the suit has now reached, to go on with the inquiry. And we are unable to say that in this it has committed any error in law. We are also unable to say upon the limited facts which are placed before us that it is inexpedient, or, for any other reason, improper, that this investigation should now be continued. We therefore feel that we must, in view of the course which the lower Court has taken, dismiss this appeal. But we desire at the same time to press upon the attention of the lower Court the necessity of taking care that these wassilat-proceedings are henceforward pursued diligently by the judgment-creditor, and carried on to a due conclusion as soon as possible.

Under all the circumstances of the case, we think that each party should bear his own costs in this Court.

The 19th December 1873.

Present :

Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

Joint Hindoo Family—Partition—Intention.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Doorga Pershad and others

versus

Mussamut Kundun Koowar.

Inasmuch as there may be (*vide* case of Appoovier *vs.* Ramasubha Aiyan and others, 11 Moore's I. A. 75; and 8 W. R., P. C. 1) a division of a joint and separate Hindoo family and of the joint property, such as to alter the *status* of the family, without a regular partition by metes and bounds, the question in every particular case of disputed division must be one of *intention*—whether the intention of the parties, to be inferred from the instruments which they have executed, and the acts they have done, was to effect such a division.

THE appellant in this case is the childless widow of Moneerut Dass, who was the son of one Showkee Lall, and the respondents are the descendants of the three sons who, with Showkee Lall, constituted the family of the common ancestor.

The family must be presumed to have been originally joint. The suit was brought by the widow, claiming as heiress of her deceased husband his share of the property in question. The family are Agurwallas by caste, but Jains in religion, and, as the suit was originally framed, she claimed to be entitled to the property of her late husband, whether the family was divided or undivided under the law regulating successions among the Jains. The third and fifth issues settled in the suit raised this question; and the Principal Sudder Ameen decided those issues, as well as those upon which the determination of this appeal depends, in favour of the widow.

Upon appeal the High Court held, *first*, that there was no sufficient evidence in the cause to show that the law of succession among the Jains was different from that of the ordinary Hindoo Law, governing the particular province in which the property was situated, which in this case is the law of the Mitakshara; but, *secondly*, that, in the circumstances of the case, the plaintiff was under that law the heiress of her husband and entitled to recover the property in dispute. Mr. Cutler, who appeared for the respondents, did not altogether give up the first point; but, as their Lordships have formed an opinion that the judgment of the High Court is correct upon the second, they will assume that it was equally correct in respect of the law regulating the succession of this family. The question then is reduced to this: Was this family at the time of the death of Moneerut Dass an undivided Hindoo family in such a sense that, according to the law of the Mitakshara, his widow was entitled merely to maintenance, and his share passed by survivorship to the nearest male members of his family; or was it so separate in estate that by the operation of that law the widow was entitled to succeed to her husband?

It is an undisputed point in the case that the members of this family in October 1851, that is, in the lifetime of Moneerut Dass, executed an ikrarnama, and that thereafter, if not before, the property was managed and enjoyed in conformity with the provisions of that instrument.

The learned Judges of the High Court have held that, upon the authority of the case of Appoovier *vs.* Ramasubha Aiyan and others, 11 Moore's I. A. 75,* the family must be taken to have been separate in interest and title, and therefore that the widow was entitled to succeed. The learned

* From the judgment of Peacock, C.J., and L. S. Jackson, J., in Regular Appeal No. 309 of 1865, decided on the 29th June 1867—8 W. R. 116.

* 8 W. R. (P. C.) 1.

f Justice, it may be inferred from his ment, would have been, independently t case, of this opinion upon the con- ion of the ikrarnama. The other d Judge, Mr. Justice Jackson, seems ve had serious doubts whether that ment did operate as a division of the y, but conceived himself bound, as we his judgment, by the authority of the in the Privy Council.

e authority of that case is of course ing upon us here; and the only question ether the present case is distinguishable it. It is not necessary to go through whole judgment, as Mr. Leith called us to do, or to consider with nice ism whether this or that proposition is not stated in words stronger than were sary. The broad point which their ships conceive to be decided by the case t there may be division of a joint and ate Hindoo family, and of the joint erty without a regular partition by and bounds. Lord Westbury, after g that the term division is capable of a old application, that there may be a on of right, and there may be a division operty, says: "Thus after the execution this instrument there was a division of ht in the whole property, although in e portions that division of right was intended to be followed up by an actual tition by metes and bounds, that being stponed till some future time, when it uld be convenient to make that parti- n." In another passage he says: "We d, therefore, a clear intention to subject whole property to a division of interest, hough it was not immediately to be rfected by an actual partition." And, in, speaking of the legal effects of the d, he says: "It operated in law as a nversion of the character of the property d an alteration of the title of the family, nverting it from a joint to separate nership, and we think the conclusion of w is correct, *viz*, that that is sufficient to ke a divided family, and to make a ivided possession of what was previously ndivided, without the necessity of its ing carried out into an actual partition of e subject-matter." The fair inference n the decision seems to their Lordships to hat inasmuch as there may be a division he kind there spoken of, *viz.*, a division ch though not carried out by a partition hetes and bounds, would, nevertheless, r the *status* of the family, the question every particular case must be one of intention, whether the intention of the parties to be inferred from the instruments which they have executed, and the acts they have done, was to effect such a division.

The decision of this case must turn upon the application of these principles to the ikrarnama, and their Lordships are of opinion that the construction which the learned Chief Justice put upon that instrument is substantially correct. The family at the time of the execution of the instrument appears to have been in that state which so often gives rise to very difficult questions in Courts of law, and of which we had recently a very remarkable instance, namely, the question whether the family is joint or separate; and if joint, in what degree, and in what particulars, the different members of it possess separate property? It is clear that some members of this family before the date of the ikrarnama had been carrying on business separately and on their own account. There was also a kotee in which they were jointly interested, and there seems to have been a number of landed estates, some of them standing in the name of one member of the family, and some of them standing in the name of another. That state of things may, however, afford an argument in favour of the contention of either party. On the one hand it may be said that in executing the ikrarnama the members of the family desired only to make clear what was to be joint, and what was to be separate. On the other hand it may be argued that the object of the ikrarnama was to establish beyond all future question the undivided *status* of the family.

The learned Chief Justice appears to have assumed that the instrument was merely declaratory of the antecedent state of the family. Their Lordships do not think it necessary to decide that question, as to which there may be some doubt, because they entirely agree in an observation which he subsequently makes, to the effect that if the instrument did not declare that to have been the state of the family, yet, upon the true construction of it, it created such a state. However, there are passages which support the view of the Chief Justice as to an antecedent division of interest. The document begins by stating: "We four co-sharers, "being in possession of equal shares, *viz.*, "of one-fourth each, without contention from "any one, appropriate and enjoy the profits "thereof in proportion to our respective "shares." Those words appear to their Lordships to point to an appropriation and

enjoyment of the profits inconsistent with that which is the normal state of enjoyment of a joint and undivided Hindoo family. It then goes on to say: "Now, with a view to "avoid future complications, in consultation "and agreement among ourselves, we have "under our signatures executed four chittas "with regard to the said kotee up to the 24th "of the month of Kowar of the year 1259 "Fuslee, and four schedules with regard to "houses and shops, both ancestral and pur- "chased, mango and mahawa orchards; and "also four schedules regarding silver articles, "tents, &c., articles for assemblies and con- "veyance, &c., and all the partners have "retained one of each." The deed thus proceeds: "We have executed this deed to "have matters entirely above board, and to "have names enrolled in the Government "record in respect of the estates. It is "desirable and very necessary for us decla- "rants, according to this deed, to have the "names of all the parties enrolled for equal "shares." Upon this it may be remarked that there could be no actual necessity, if they continued as a joint family, "to have "the names of all the partners enrolled for "equal shares, *viz.*, one-fourth in the name "of me Lalla Mukhun Lall, one-fourth in "the names of us Lalla Mahaber Pershad "and Munhur Dass," and so on. There is not much, if any, evidence on the record as to what was done in order to procure a mutation of names, or to carry out this stipulation of the deed; but if it were carried out in the way proposed, that appears to their Lordships to be strong *primâ-facie* evidence of the intention to hold the undivided shares as the separate property of each co-partner. It may not be conclusive, but at all events it is strong *primâ-facie* evidence of such an intention. It is confirmed, in their Lordships' opinion, by what appears upon the face of the butwarra-proceedings, in which the present respondent, the plaintiff, is named as the heir of her late husband, and representing his interest in the proceedings taken for a formal partition by metes and bounds of certain properties between the whole of this family on the one side, and certain co-sharers in those properties on the other. The deed next proceeds to deal thus with the kotee: "Now "also by amicable settlement the business "of the kotee will continue to be carried "on jointly and in partnership in the same "manner as carried on heretofore. We will "amicably transact all matters connected "with the kotee in consultation and agree- "ment among ourselves, and will [illegible] "appropriating and enjoying the p[illegible] "thereof in proportion to the afore[illegible] "shares, *viz.*, equal one-fourth share ea[illegible] It then provides for any estates which [illegible] be purchased out of the moneys of [illegible] kotee.

The Principal Sudder Ameen, upon [illegible] inspection of the accounts, has found [illegible] the learned Judges of the High Court a[illegible] with him) that the accounts were kept [illegible] way from which it is to be inferred [illegible] when the accounts of the kotee were balan[illegible] each of the four partners was entitled to [illegible] separate share of the profits realized; o[illegible] other words, that the accounts were kep[illegible] they would be kept between four ordi[illegible] partners, and not as they would be kep[illegible] between members of a joint and undiv[illegible] Hindoo family.

The deed then provides that certain [illegible] articles, tents, carpets for assemblies, [illegible] conveyances, shall continue as before [illegible] possession of all four sharers. Their L[illegible] ships do not think that that is a [illegible] unusual stipulation as to certain article[illegible] property, even in cases in which partitio[illegible] carried out formally, and, as to the gre[illegible] part of the property, by metes and bou[illegible] Therefore they can infer from that stipul[illegible] no intention contrary to the intention w[illegible] the learned Judges of the Court below [illegible] imputed to the parties in framing this d[illegible]

Their Lordships, after carefully conside[illegible] the whole deed and the evidence in the ca[illegible] have come to the conclusion that this cas[illegible] undistinguishable from that in the [illegible] Moore; that the real intention of the pa[illegible] to the ikrarnama was to hold and enjoy [illegible] property which was the subject of i[illegible] severalty; and that the decree of the C[illegible] below is correct.

It is to be regretted, no doubt, that [illegible] parties who make such arrangements sh[illegible] not declare on the face of the deed w[illegible] their intention is, and that, if they are [illegible] undivided family, it is their intention ther[illegible] forth to cease to be so. On the other ha[illegible] it is to be observed that there is no state m[illegible] upon the face of the deed in question h[illegible] that the *status* of indivision had contin[illegible] up to its date.

On the whole their Lordships must hum[illegible] advise Her Majesty to affirm the dec[illegible] under appeal, and to dismiss this app[illegible] with costs.

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The 20th January 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Special Appeal—Error of Investigation—Remand.

Case No. 1661 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 1st May 1873, reversing a decision of the Additional Moonsiff of Khoolneah, dated the 24th June 1872.

Shibo Soonduree Dossee (Defendant), *Appellant,*

versus

Chunder Kant Ghose (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose and *Bungshee Dhur Sen* for Appellant.

Baboos Gopal Lall Mitter, Grija Sunkur Mojoomdar, and *Kishen Doyal Roy* for Respondent.

In this case, departing from its general rule in special appeals not to disturb the finding of fact arrived at by the Court below, the High Court—seeing that on the one hand the Judge had misrepresented the effect of the evidence in some important particulars, and on the other had omitted to notice facts very much in favour of the defendants—considered itself justified in saying that his mode of dealing with the appeal had led to material facts in the investigation of the case which had produced error in the decision on the merits. It accordingly reversed his judgment and remanded the case for re-trial.

Jackson, J.—It appears to us that in this case we have reason to depart from the general rule of this Court in a special appeal not to disturb the finding of fact arrived at by the Court below; because on reading the judgment of the Lower Appellate Court, and comparing it with the evidence which it had to consider, it seems clear that on the one hand the Judge misrepresents the effect of that evidence in some important particulars, and on the other he has omitted to notice facts which go very much in favour of the defendant. We do not find any passage in the decision of the Judge in which he controverts the clear and emphatic conclusion of the Court of first instance, that Buroda Pershad Mustofee, and after him his widow, had been in possession of the lands to which the disputed pottah relates, and we think it was impossible that either Court should have come to any other conclusion; because, independently of the testimony of the gomashta Chunder Nath Ghose and the ryots who swear they paid rents to the defendant, there were three decrees obtained by the defendant, and there was evidence which the Judge admits, but which he does not displace, that the defendant dug a tank in the land in dispute, which is certainly a very strong mode of asserting a permanent interest in land. That being so, the real question in the case was whether the vendor of the plaintiff did or did not grant to Buroda Pershad Mustofee the mowrosee pottah in question. The Judge himself considers that the absence of stamp or registration did not affect the authenticity of the pottah, as the law in those days did not require those formalities; but the principal point, the Judge says, is that the alleged writer of the deed denies that he wrote it. It appears to us that the entire force of that denial is taken away by the circumstance that this witness was not called by the defendant, who produced the pottah, but by the plaintiff. It does not appear that this witness ever had an opportunity of looking at the pottah, or forming an opinion whether it was his handwriting or not. The very circumstance that he was called by the plaintiff clearly shows that he came into Court prepared to say that it was not his handwriting. Specimens of the witness's handwriting were produced before the Court, which the Moonsiff, a native gentleman, himself considered exactly to resemble the writing of the pottah. Upon that the Judge only says that proceeding upon comparison of handwriting is a dangerous ground, but he himself

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does not hesitate to express a different opinion. He seems to think that the two signatures are extremely unlike to each other. The Judge goes on to say with reference to the evidence of this writer of the pottah: "In the absence "of any evidence to show why he should have "perjured himself or any direct statement "contradictory of his by other witnesses, I "think the Moonsiff was not justified in "repudiating his evidence." Now, in the first place, this witness shows that he had been formerly in the service of the defendant, and is now in the service of the plaintiff, and as to contradiction there is certainly one witness at least who expressly contradicts Bindoo Beharee, and he swears that he saw Bindoc Beharee write the document, and certainly if the defendants had been setting up this spurious pottah, which had not been registered and had not been stamped, they certainly would not have made choice as the alleged writer of it of a person who was formerly in their own employ, and had gone over to the opposite camp. We think therefore that the Judge has miscarried in his statement of the effect of this witness's evidence and in considering the surrounding circumstances.

The Judge then says: "Next, Kali "Nath's signature is impugned, as his "son and nephew cannot swear to it; nay, "evidently, doubt it. They further declare "that he had no authority to make such a "lease, being only one of the three share-"holders; and here he has written throughout "as if the property were his own personally. "They also say that no rent was ever paid "under the pottah, and that no counterpart "kubooleut is in existence so far as they are "aware." This is, no doubt unintentionally, a most unfair account of the evidence of these persons. They do not, it is true, swear to the signature being that of Kali Nath, but one of them at least says it resembles his signature. One of them certainly says he believes from what took place that Kali Nath had given the lease, and another says he heard from Kali Nath himself that he had given the lease. One of the nephews also says that Kali Nath was the manager, and that all that he did was done with their authority. One of the kindred also says that, on two or three occasions, there was adjustment of the rent under this pottah by setting it off against some other debt.

The Judge proceeds: "Then, supposing "the seal to be really Kali Nath's, we have "it stated that the seal was lost, and there-"fore an impression of it must be liable to "suspicion." Now the argument us before us to-day in respect of this seal that the impression was not legible. Bu the seal had been lost and had gone into hands of the defendant, as the Judge s mises, he would have taken care to put a l ble impression of it upon the docum Then the Judge proceeds to object to decrees for rent which he says "are *ex pa* and though one purports to have b executed, the entry of execution is auth ticated by no signature." We are sorry find a Judge of the District Court throw discredit upon decrees of Court merely u the ground that they are *ex parte*. Jud of every Court are answerable for proce ings of their own Court, and the Judge o District Court is also answerable to so extent for proceedings of Courts subordi to his own, and upon the principle of *om praesumuntur rite esse acta*, we must the proper effect to the decrees in those c till reason is shown for doing otherwise.

The Judge then says: "No other p "is adduced of receipt of rent, except "statements of some ryots whose pottahs h "been lost or destroyed." This is incorr The gomashta Chunder Nath Ghose sw that he collected rents from the r and he produced some papers in corrob tion of that statement. The Judge fi remarks: "Here certainly remains "evidence as to the digging of the t "which might be taken as an act of pe "tual ownership, but supposing that evide "to have been correctly understood, it c "only be corroborative of a title other "*primâ facie* good." As to that ma we have already remarked that the digg of the tank is very strong evidence possession.

The passages which we have read c prise almost the whole of the Judge's d sion upon the merits of this case, and bes show that they are so full of misrepres tions, undesigned as we have said, or of o sions to notice important points in the c that we think we are justified in saying the Judge has miscarried in his decision, that his mode of dealing with the appeal led to material defects in the investigatio the case which have produced error in decision on the merits. We, therefore, rev the judgment of the Lower Appellate C and order that the case should go back re-trial, as it is not the duty of this C in special appeal to give a final decision the evidence. The costs of this appeal follow the result.

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The 26th January 1874.

Present:

Hon'ble W. Markby and E. G. Birch, *Judges.*

...ale of Putnee—Suit by Dur-putneedar for Damages—Reg. VIII. of 1819, s. 17, cl. 6.

Case No. 1043 of 1873.

...rial Appeal from a decision passed by ... Officiating Judge of East Burdwan, ...ated the 24th February 1873, affirming a ...ecision of the Subordinate Judge of ...at District, dated the 30th September ...872.

...Soorjo Coomaree Bibee (Defendant), *Appellant,*

versus

...gamburee Dossee (Plaintiff), *Respondent.*

...oos *Hem Chunder Banerjee* and *Ashootosh Dhur* for Appellant.

...oos *Sreenath Doss* and *Taruck Nath Dutt* for Respondent.

...ge.—A suit for the recovery of damages on account ...e loss of plaintiff's dur-putnee tenure R, which ...ed a part of the putnee lot K which was sold under ...ation VIII. of 1819 for arrears of rent, was brought ...st S as the ostensible owner, the real owner having ...alleged to be her late father, whose widow and son ...accordingly made defendants. It was alleged that ...ur-putnee rents had been paid to end of Assin, and ...the rents for Kartick had been offered but refused. ...first Court found these allegations true, decided ...S was the real owner, and decreed the suit. It was ...ded in appeal that the receipt put in as proof of ...leged payment bore the seal of the widow K, and ...of the daughter S. The Lower Appellate Court ...sufficient proof of the payment irrespective of the ...t, and confirmed the first Court's decree:

...LD as to the real question in the suit, that ...gh plaintiff had not complied with the proviso in ...lation VIII. of 1819, s. 17, cl. 6, exactly in the mode ...d, yet with reference to the uncertainty as to who ...the person (mother or daughter) to whom rent was ...she had complied substantially with the require...ts of the law by payment of the rent for the period ...hich the rent of the superior landlord was unpaid.

...arkby, J.—THE real question in this ... was whether or no the plaintiff had ...plied with the conditions of the proviso ...use 6 of section 17 of Regulation VIII. ...819. Now no doubt she did not succeed ...owing that she had complied with them ...ly in the mode in which she stated in ...plaint. But it was a case in which it ... exceedingly likely that the plaintiff ...t have some doubt as to really who was ... person (mother or daughter) to whom ...rent was due; and substantially her ...gation was that she had complied with the requirements of that clause, which are that she should have paid the rent due for the period for which the rent of the superior landlord was due and remained unpaid; and on that point the Lower Appellate Court has distinctly found in the plaintiff's favour.

Then as to the argument that the defaulter mentioned in section 5 of that Regulation may be some person other than the putneedar,—that would be contrary, as it appears to us, to the sense in which that term is used in the preceding clause and in clause 7 of the same section.

On both these points, therefore, the special appeal fails, and must be dismissed with costs.

The 26th January 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act VIII. of 1859, s. 287—Execution—Jurisdiction.

Case No. 320 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 14th August 1873.

Mussamut Dhunesh Koeree (one of the Judgment-debtors), *Appellant,*

versus

Oolfut Hossein, Petitioner (one of the Decree-holders), *Respondent.*

Moonshee Mahomed Yusuf for Appellant.

Moonshee Abdool Baree for Respondent.

The Court of a district other than that in which a decree is passed has no jurisdiction in the matter of its execution excepting such as it may obtain in pursuance of s. 287 of the Code of Civil Procedure, which does not give him any jurisdiction to entertain or determine any question as to the right of the person asking execution.

Phear, J.—IT seems to us that the proceedings in this matter have been, almost we may say from the beginning to the end, so exceedingly irregular, that we cannot on this appeal allow the order of the lower Court to stand.

The Patna Court was not the Court which passed the decree now sought to be enforced, and consequently it has no jurisdiction in the matter of executing the decree excepting such as it may obtain in pursuance of the provision of section 287 of the Civil Pro-

cedure Code. The Court which actually passed the decree was the Court of the Subordinate Judge of Gya; and the mode in which the petitioner, if he is entitled to obtain execution of that decree, ought to have proceeded was to get the Judge of Gya to send a copy of the decree and a certificate of the amount due at the time of application under the decree, to the Judge of Patna. And upon this copy decree and certificate coming before the Judge of Patna, that Judge would have power to issue execution to the person who appeared by the copy decree to be the person entitled to execute the decree and to obtain full satisfaction of it.

The Judge of Patna ought not to have before him anything more than this copy decree and certificate; and indeed, he wants nothing more, because the Civil Procedure Code does not give him any jurisdiction to entertain or to determine any question as to the right of the person asking for execution to have that execution. If questions of that sort are raised before him upon an application for execution being made, and he thinks there is any reasonable ground for them, he should send them back to the Court which passed the decree, and which alone rightly has the whole record of the case before it, to hear and determine them. We do not understand how it has happened in the present instance that the record is with the Judge of Patna instead of with the Subordinate Judge of Gya.

Then we also fail to discover in the record any proper copy decree and certificate within the provisions of section 284 and following sections of the Civil Procedure Code. There is a roobakaree of the Subordinate Judge of Gya which begins with long and irrelevant recitals of matters which have occurred in the case previously to the making of the roobakaree, and it ends seemingly with an order or representation that the present petitioner was entitled to take out execution to the extent of two annas of the decree. Whether anything besides this in the shape of a copy of the decree or of a certificate was sent we do not know. But it seems to be quite clear that the Judge of Patna ought not to have acted upon anything of this kind. A proper copy of the decree would show exactly the precise words of the decretal order and also the person who at the time when the copy was made was entitled to stand in the shoes of the judgment-creditor. Anything less than this would not be a copy of the decree.

We need hardly add that, under provisions of section 207 of the Civil P cedure Code, one person only out of a of joint judgment-creditors has not autho excepting by an express order of Cou obtain execution of the joint decree. the necessary order of the Court for purpose must appear on the record in s shape which will be equivalent to an or putting the individual decree-holder in place of the aggregate decree-holders, wh ever in the judgment of the Court circumstances are such as to justify an o to that effect being made under section Before the Subordinate Judge of Gya make a good and sufficient copy of decree, enabling the present petitioner execute it elsewhere than in the Gya Co he must complete the record in his Court by putting the present petitioner the place of all the decree-holders for purpose of executing the decree. When has done so, the copy decree will ex that fact, and the certificate will show much is due under the decree. As fa we can gather from anything on the rec the present petitioner does not stand in position at all. The roobakaree of Subordinate Judge which has been rea us and before spoken of, represents only as being entitled to execute the de to the extent of 2 annas; and it is q certain that the Judge of Patna has jurisdiction under the Civil Procedure C to execute a copy decree which comes him in that shape. He can only exec a decree as one and indivisible, and no partial decree.

It appears to us, therefore, that the or of the Judge below, as has already b said, was made without jurisdiction, must be reversed. This will be altoge without prejudice to the right of the p tioner to go to the Subordinate Judge Gya, and get himself placed on the reco if he is entitled to be placed on the reco as the sole decree-holder.

The records of the case must be retur to the Judge of Patna with the direct that he send them back to the Subordin Judge of Gya, to whose Court they belong

We think that the appellant ought to h his costs in this Court. But inasmuch no objection was made to the jurisdiction the Court below, we think there each p must bear his own costs.

We allow one gold mohur for pleader's fe in this Court.

h

The 27th January 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Charles Pontifex, *Judge.*

Indian Succession Act (X. of 1865)—Minors—Minority.

Case stated for the opinion of the High Court in its Ordinary Original Civil Jurisdiction by the 1st Judge of the Small Cause Court at Calcutta, under Section 55 of Act IX. of 1850.

Sultan Chand Kehul Chand, *Plaintiff,*

versus

J. Smyth and J. G. Joakim, *Defendants.*

The definition in the Indian Succession Act of "minor" or "minority" does not apply in cases where a person enters into a contract on his own behalf and not in a representative character under that Act; the law being applicable to cases of intestate or testamentary succession.

Case.—THE plaintiff sued the defendant for Rs. 225 on a promissory note. The defendant pleaded minority. It was proved that the defendant, at the time of the trial, had passed 20, but had not reached 21 years; that he was the legitimate son of a lady born in Ireland; that his father was a gentleman of Portuguese extraction, domiciled in Calcutta; that his paternal grandfather was born in Portugal, had resided some years in Calcutta, but had returned to Lisbon, and there died; and that he himself was born and had always lived in Calcutta. Under this state of the evidence it was contended for the defendant that, being the legitimate son of a mother born in Ireland, he was an European British subject under the definition of "European British subject" contained in the Criminal Procedure Code, and was thus within the only exception to the rule of 18 years as the age of majority which was contained in Act XL. of 1858, which Act had been ruled in Archer *vs.* Watkins, 8 B. L. R., p. 372, to be of universal application, except in the case already mentioned of European British subjects. The plaintiff, on the other hand, contended that the defendant had not been proved an European British subject, inasmuch as the status of a defendant depended on his domicile, and a son's domicile was that of his father, and the defendant's father's domicile had been shown to be in Calcutta. The defendant therefore, it was contended, came within the general rule in Act XL. of 1858, and not within the exception, and, being above 18 years of age, had reached his majority.

I held that, as Archer *vs.* Watkins had been overruled by the Full Bench in the matter of the petition of Benode Beharee Mullick,* 10 B. L. R., p. 231, where it was ruled that Act XL. of 1858 had no application to residents in Calcutta, and defendant and his father were both of them residents in Calcutta, the question, whether the defendant was or was not an European British subject, was wholly immaterial to the case; that he had been proved not to be either a Mahomedan or Hindoo, and that the English Law was the law applicable to all persons domiciled in Calcutta, as defendant had been shown to be, who did not belong to one or other of those two classes which are entitled to be governed by their own laws, and that defendant must, therefore, be held a minor. I also held that the definitions of "minor" and "majority" contained in the Indian Succession Act (X. of 1865) did not apply to cases of contract, but were confined, by the very section that contained them, to cases of intestate and testamentary succession; and on these grounds I gave judgment for the defendant. As, however, I had some doubts in my own mind whether it was possible to distinguish so completely between cases of contract and cases of intestate and testamentary succession as to apply to one of these classes of cases, in the instance of persons domiciled in Calcutta, the law of majority at 18 years of age, and to the other the law of majority at 21 years, I made my judgment contingent on the opinion of the High Court upon the question, whether I was right in holding that the definitions of "minor" and "majority," though they do apply to persons domiciled in Calcutta as well as to all others in India, only so apply in cases of intestate and testamentary succession, and not in cases of contract.

At the request of the plaintiff, I also refer the following question which he considers of importance, though it is, in my opinion, entirely irrelevant to the real issue, *viz.*:—

Whether the son of a man who is of Portuguese extraction having an Indian domicile by his wife who is a native of Ireland is a European British subject?

No costs have been deposited here as security for the costs of this reference.

The parties were not represented on the reference before the High Court.

* 19 W. R. 110.

The Chief Justice delivered the following judgment:—

Couch, C.J.—We are of opinion that the definition in the Indian Succession Act of minor and minority does not apply in cases where a person enters into a contract on his own behalf and not in any representative character under that Act. Section 2 of the Act shows what the law in it is to be applicable to, *viz.*, cases of intestate or testamentary succession.

As to the second question, it was not necessary that it should be determined by the Judge of the Small Cause Court, and the plaintiff ought not to have asked to have it referred to this Court.

The judgment must be for the defendant, as it has been given by the Judge of the Small Cause Court.

The 27th January 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Joint Family-property—Right of Members.

Case No. 1695 of 1874.

Special Appeal from a decision passed by the Officiating Judge of the 24-Pergunnahs, dated the 25th May 1873, reversing a decision of the Officiating First Subordinate Judge of that District, dated the 9th May 1872.

The Collector of the 24-Pergunnahs, on behalf of the Court of Wards, and another (Defendants), *Appellants,*

versus

Debnath Roy Chowdhry and others (Plaintiffs), *Respondents.*

Baboos Unnoda Pershad Banerjee and *Sreenath Doss* for Appellants.

Baboos Ashootosh Dhur and *Nil Madhub Bose* for Respondents.

Although the members of a joint Hindoo family have all, in strict law, a right to participate in every portion of the joint property, that right may be modified by the conduct of the parties, *e.g.*, when a particular member is allowed to retain sole possession of a garden, and to improve and beautify it, and to adapt it to his own purposes.

Jackson, J.—It appears to us that the plaintiffs in this suit were not entitled to the relief which they asked for, and which the Lower Appellate Court has given. Their allegation was that they and the defendant Prannath, who is since dead, and whose e is represented by the Collector on beh the Court of Wards, jointly held, in shares, a piece of land, measuring 2 be 7 cottahs 11 chittacks 3¼ gundas, situa Kasseepore within Dehee Punchannog that, in Cheyt 1271, the said defendant, with the other defendant, Bidhoo Moo Debee, who is the daughter of Pran dispossessed them from their 8-annas by enclosing the entire piece by a brick- wall, and by removing and appropriati portion of the building standing there They therefore prayed for possession o said share by separation and division, as for wassilat. Now it has been found both the Courts that, so far from this ment being true, the garden in question, the building standing upon it, which origi formed, and, it may be in the eye of the now forms a portion of the joint fa property, has been by consent in the possession of Prannath Chowdhry, since family separated in mess and in in (though no division by metes and bounds place) so long ago as the year 1257; that Prannath Chowdhry afterwards, so as he could do it, made gift of this pro to his daughter, the defendant Bi Mookhee, so long ago as the year 1268. defendant Prannath was for many year seems, the leading member or *kurta* of joint family. It is in evidence that, while on the one hand, made use of this s portion of the property as his own, plaintiffs, in like manner, in the exerci their own rights, made a gift of a house, w seems to have been the old family-house, their gooroo. The family is a wealthy o possessed, it seems, of large property, such enjoyments or appropriations passed without notice, so long as the members on good terms. Now, although the plain have in strict law a right to participate every portion of that joint property, t right comes to be modified by the conduct the parties by which a particular member the family was allowed to retain sole pos sion of this garden, and improve it, bea it, and adapt it to his own purposes. would be contrary to all principles of eq to permit, under such circumstances, other members of the family to come Court, and omitting all reference to any portion of the property, to sue for pos of this particular portion. To do that be to take away from the defendan whole advantage of that which he had allowed so long a time to occupy, and wo

act, have the effect of constituting the its a source of annoyance rather than ng plaintiffs any reasonable and necessary f. It appears to us that this equitable ciple has not been sufficiently kept in by the Lower Appellate Court, and the ment of that Court must consequently t aside.

e think it should be added to our ment, and we do so by consent of the al appellants, that, though the present is dismissed, it must be understood that ift of this property to Bidhoo Mookhee t regarded as taking the garden and the ises in question out of the category of family-property which would have to ken into account in case any partition- be ever brought in respect of that family- erty. The decree which we are about to e would be, we consider, the proper decree he Subordinate Judge to make, and in case the Subordinate Judge should have ted each party to pay his own costs. We fore think that each party should pay own costs in the Subordinate Judge's rt, and that the plaintiffs should pay the of both the Appellate Courts.

The 28th January 1874.

Present:

Hon'ble J. B. Phear and G. G. Morris, *Judges.*

ne-profits—Damages—Cause of Action—Act VIII. of 1859, s. 7.

Case No. 90 of 1873.

ular Appeal from a decision passed by e Additional Judge of Tirhoot, dated e 10th December 1872.

ussamut Rookminee Kooer and others (Defendants), *Appellants,*

versus

m Tohul Roy and others (Plaintiffs), *Respondents.*

boo Taruck Nath Sen for Appellants.

No one for Respondents.

ne-profits claimed for a period of dispossession ubstantially damages; the ground upon which the ff in any case is entitled to ask for them being ongful conduct of the defendants in dispossessing eeping them out of possession; and every suit t to recover mesne-profits must, by Act VIII. of s. 7, include the whole claim arising out of the e of action which gives the ground for the claim.

Phear, J.—We need not hear argument on the part of the appellant in this case. But unfortunately no one has appeared on behalf of the respondent. If we thought that there could be any serious ground offered to our notice upon which the judgment of the lower Court could be supported, we might even now possibly postpone the case upon terms until some one should be able to appear for the respondent. But the case is very clear indeed, as it seems to us the Judge has misapprehended the nature of the cause of action upon which the plaintiff sues. The present plaintiffs, or those whom they represent, before bringing the present suit, brought an action against the present defendants complaining of wrongful dispossession from certain property, and asking to recover possession and also mesne-profits in respect of two years—1274 and 1275—out of the whole period during which they had been wrongfully kept out of possession as they alleged. They obtained a decree for possession and also for mesne-profits in respect of these two years—1274 and 1275. It seems further that they eventually obtained possession under that decree.

The present suit is brought in order to recover mesne-profits for the year 1273; that is to say, to recover damages for the wrongful conduct of the defendants additional to those damages which were recovered by them in the former suit founded upon that wrongful conduct. Mesne-profits, or rather damages for mesne-profits, are, no doubt, usually measured by the actual rents and profits of the land issuing during that period of dispossession; but they are essentially damages. The ground upon which the plaintiff in any case is entitled to ask for those damages is the wrongful conduct of the defendants in dispossessing and keeping him out of possession. That matter, in the present case, has already been tried, and a claim to mesne-profits arising out of it decreed; and, if the plaintiff did not, in the first suit, ask for damages in respect of the year 1273 as well as in respect of the years 1274 and 1275, it was his own fault or misfortune; and he must suffer the consequences. It seems to us perfectly plain that the plaintiff has not in substance any cause of action in this suit other than the cause of action upon which he brought his former suit for mesne-profits. He only desires to obtain damages additional to the damages which he recovered in that suit. Although, no doubt, a claim for mesne-profits is for the special purposes of sections 8 and 9 of the

Civil Prccedure Code *deemed* a separate *cause of action* from a claim for the land in respect of which it is made, yet it cannot itself be divided, and every suit brought to recover mesne-profits must, by section 7 of the Civil Procedure Code, include the whole claim arising out of the cause of action which gives the ground for making it.

We therefore are of opinion that the decision of the Court is wrong in law, and must be reversed with costs.

The 28th January 1874.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Suit for Kubooleut—Excessive Claims.

Case No. 1102 of 1873.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 3rd April 1873, reversing a decision of the Moonsiff of Boulpore, dated the 4th January 1873.

Jellor Ruhman and others (Plaintiffs), *Appellants,*

versus

Seetaram Dutt and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Baboos Umerendro Nath Chatterjee and *Kishen Kumul Bhuttacharjee* for Respondents.

A party, having obtained a decree for resumption, declaring that he was entitled to assess rent upon certain land, brought a suit for a kubooleut. The first Court found that the extent of the land was less than that alleged in the plaint, and the rate of rent to which plaintiff was entitled lower than that claimed. Accordingly it decreed a kubooleut for the proper quantity of land at the proper rate. The Lower Appellate Court dismissed the suit, on the ground that the plaintiff had not proved the claim stated in the plaint:

HELD that the District Judge had rightly applied the decision in 10 W. R., p. 14, which was equally applicable to cases in respect of lands for the first time resumed and assessed.

Markby, J.—THE plaintiff, in this case, having previously obtained a decree for resumption of certain land declaring that he was entitled to assess rent upon it, brought a suit for kubooleut, stating the fact of his having obtained that resumption-decree, and also that, with reference to the rates of rent paid for the neighbouring lands of equal quality, the rent for the land in question might be fixed at Rs. 159-11, and he stated the quantity of the land to be 39 beeg and 19 cottahs. The Moonsiff, after remand, which does not in any way upon the question which is now be us, found that the extent of the land wa beeghas and 3 cottahs, and not 39 beeg and 19 cottahs as alleged in the pl and that the rate to which the plai was entitled was Rs. 67-2, and Rs. 159-11; and the Moonsiff direc that the plaintiff do obtain from defendants a kubooleut for 34 beeghas 3 cottahs of land at an annual rent Rs. 67-2; and that, on the defend failing to execute the kubooleut, decree was to be regarded as such. T the defendant Seetaram, who alone defe the suit in the Court below, appealed ag the judgment of the Moonsiff; and, in app the District Judge held that, as the plai had not proved his claim as stated in plaint, the suit ought to be dismissed.

Now, in special appeal to this Court, the point raised is that the Judge was wron holding that a decree for kubooleut could be made. But it appears to us that, in holding, the District Judge rightly appl the decision in 10 Weekly Reporter, page upon which, no doubt, he acted. That c did not arise upon a suit for resumption land, the land in that case having been p viously resumed and assessed with rent; b the decision has been since applied to ca in respect of lands resumed for the f time, and for the first time assessed w rent; and we are not aware of any princi upon which these two classes of cases c be distinguished from each other. The can be no doubt, therefore, that the jud ment of the District Judge on this poin right.

Then it is contended that, even assumi that the judgment of the District Judge w so far right, nevertheless he ought not have dismissed the suit altogether; and th while refusing to order the defendant execute a kubooleut, he ought to have allow the decree of the Moonsiff to stand so f as it fixed the rent, and ascertained the qu tity of the land which was liable to assessed. Now, it does not appear that t view of the case was presented to the D trict Judge, and therefore it cannot be s that there was any error in law or proc dure in his decision. The plaintiff can on now claim the indulgence of the Court asking us to let the decree of the Moons stand for that purpose, but, seeing the opini which the District Judge has expres

d

this case, we think we ought not to do The Judge has stated that, if the plaintad demanded fair and equitable rates the defendant, possibly the defendant t have agreed to the demand, and thus led being dragged into litigation. He pointed out that not only the land claimed e assessed is larger than is really held the defendant, but the rates demanded more than double of what was found to really the proper amount of rent. Under e circumstances, we think that the plaintis not entitled to the indulgence which asks for; and that the decree of the er Appellate Court, which was undoubtright in the shape in which the case presented to it, ought to stand. But, in ng this, we desire it to be understood that do not intend to lay down that, if this of the case had been presented to the rict Judge, and if he had in his discreallowed the decree of the first Court to d so far as it fixed the amount of rent, ascertained the quantity of land, he ld have acted contrary to law; because. ny rate, such a course seems to be one ch is sanctioned by the decision in 2 ngal Law Reports, page 5,* and we do not press any dissent from that decision. The result is that the appeal will be disssed with costs.

The 2nd February 1874.

Present:

e Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Co-sharers—Partition—Boundary.

Case No. 635 of 1873.

ecial Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 31st December 1872. reversing a decision of the Moonsiff of Mozuffurpore, dated the 12th July 1872.

Bhurrut Thakoor and others (Plaintiffs), *Appellants,*

versus

ad Meer Murtuza and another (Defendants), *Respondents.*

r. *Ameer Ali* and *Moonshee Mahomed Yusuf* for Appellants.

ghoos *Unnoda Pershad Banerjee* and *Atbinash Chunder Banerjee* for Respondents.

One of the co-sharers of a joint estate, suing conly with the others, would, under Regulation XIX. of 1814, be entitled to a separation of a mouzah from the rest of the zemindaree, and an assessment upon it of a proper proportion of the total jumma; and, having done this, he would alone be entitled to have an order for partition of that mouzah as between himself and his co-sharers therein.

If the zemindaree which the plaintiff seeks to have divided is so intermixed with the neighbouring zemindarees that the line of boundary cannot be reasonably identified, he cannot call upon the Collector to make a new line. But, if the Collector has the means of ascertaining where the boundary lies, he is bound to carry out a partition.

Phear, J.—We think that the judgment of the Lower Appellate Court is wrong upon the merits of the case. It seems to be clear, and is certainly conceded by the learned Government pleader that, if the plaintiff had sued conjointly with the other sharers of Mouzah Mudhoobunnee, he would be entitled, under Regulation XIX. of 1814, to obtain a separation of the Mouzah Mudhoobunnee from the rent of the zemindaree, and an assessment upon it of a proper portion of the total jumma of the zemindaree. And then having made that step, the plaintiff would have alone been entitled to have an order for partition as between himself and his co-sharers of the Mouzah Mudhoobunnee considered as a separate mehal with the jumma newly assessed upon it. Now we have it that the plaintiff's co-sharers in this mouzah are all agreed that this partition should be made, and consequently it appears to be clear that there is nothing whatever to prevent the plaintiff having the two orders for partition just indicated made successively to the Collector. And, if so, there cannot possibly be any reason why he should not have these two orders made simultaneously by the Judge in one suit. His right to have the orders does not depend in any way upon the nature of the suit which he may be obliged to bring in order to maintain his right to the orders. And we find in the printed rules of the Revenue Board that a successive partition of this kind is contemplated by the Revenue authorities. Rules 3 and 4 of 1865 prescribe to the Collector exactly the course of proceeding which we have just mentioned in the case of an application of the present kind.

We are therefore of opinion, upon the facts of this case, that, as between the private parties to the suit, the plaintiff was entitled to have an order for partition which he asked for, with this single modification, that he was not entitled to have the new jumma of the Mouzah Mudhoobunnee fixed at precisely the figure of the jumma which appears to have been placed upon it in the

* 11 W. R. (P. C.) 2.

quinquennial papers. Those papers can at most be evidence useful to the Collector in arriving at the amount which it is proper to assess upon the mouzah. They do not, by the necessity of the case, give a right to the plaintiff to have that jumma fixed upon the mouzah as between himself and the Government.

But it appears that the Collector was made a party to this suit; and in his written statement he objected that parts of this zemindaree which the plaintiff seeks to have partitioned are intermixed with parts of neighbouring zemindarees; and on this account he seems to have in effect objected to the order for partition which is sought for. And no doubt, if the zemindaree which the plaintiff seeks to have divided is so intermixed with the neighbouring zemindarees that the line of boundary between them or the parts belonging to each cannot be reasonably identified, there is nothing in the law which entitles the plaintiff to call upon the Collector to make a new line of division between the zemindarees. The Collector does not go to the extent of saying that the intermixture of the zemindarees is of such a kind that the parts are not capable of being identified. But, inasmuch as the objection is of no force unless he means to go to this extent, we think that we must take it that he has made an allegation to this effect. But the Judge has not inquired whether the parts of the intermixed zemindarees are identifiable or not—he has stopped short, and contented himself with the conclusion that the zemindarees are intermixed. But the intermixture alone is not a bar to the right of the plaintiff to have a partition. If the Collector has the means of ascertaining where the boundary between the zemindarees really lies—what lands are the portion of one zemindaree and what lands are the portion of the other—he is bound to carry out a partition between the parties, even though it may cost him some unusual trouble to effect it properly. This issue then is of the greatest importance in the case; and, as it does not appear to have been thoroughly tried in the Court below, we must direct the Appellate Court to try it.

We reverse the decision of the Lower Appellate Court, and remand the case to that Court for trial of the preliminary issue which has just been mentioned. In the event of the Judge being of opinion that the parties have not had reasonable opportunity of giving evidence upon this issue, he will proceed under section 354 of the Civil Procedure Code. Upon coming to a finding on this issue, he return the case to this Court, and we then give our final decision.

The 3rd February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Mo *Judges.*

Usufructuary Lease—Diluvion—Rights Lessee—Evidence—Adjournment.

Case No. 61 of 1873.

Regular Appeal from a decision passed the Subordinate Judge of Sarun, the 18th December 1872.

Sheo Golam Singh and another (Plaintiffs), *Appellants,*

versus

Roy Dinker Dyal and another (Defenda *Respondents.*

Moonshee Mahomed Yusuf for Appella

Baboo Aubinash Chunder Banerjee for Respondents.

Where a mortgagee is deprived by diluvion of possession of land over which he holds an usufr uary lease before he has repaid himself the am advanced, he has a right, unless the terms of the l are very special, to call upon the lessor for the ba balance of the loan.

If, on a day fixed, not only for the settlement of iss but also for the final determination of the case, evidence is found to be not sufficient to enable Court to come to a satisfactory decision, the Cou bound to postpone further hearing in order that parties may produce evidence, unless their failure to so was without sufficient cause.

Phear, J.—In this case the judgment the lower Court is not very clear. But the first part of it, there is perhaps enough raise the inference that the Judge was opinion that the plaint did not exhibit a cause of action. Whether this was view taken by the Judge or not, we are quite certain; but we think it right to that, if the plaintiff was, as he alle deprived, by the action of the river Gan of the possession of the land over which

an usufructuary lease before he had d himself the amount advanced by the uct of the land, we think that he would a right, unless the lease was very special terms, to call upon the defendant to him the balance of the loan which ined at that time unpaid. Whether this the case in the present instance we are le to judge, and indeed we are not called to express an opinion, because we have the terms of the lease brought under our e; and we have not had or required any nation at all of the circumstances under h the lease was granted and the posses- of the land taken. But the Subordinate e does not decide the suit between the es upon that ground. He goes on to : "Although this day was fixed for the al disposal of the case, still no proof of n-possession has been adduced by intiffs."

appears that the day upon which the rdinate Judge gave this judgment, ely, the 18th December 1872, was the which had been previously fixed for the ement of issues and the final determina- of the suit.

Ve have heard ingenious argument from learned pleader who appeared on behalf he appellant, to the effect that the words e order for summons do not go beyond g the day for settlement of issues. But Justice Morris, who is much more liar with the technical terms and the nary language of the Mofussil Courts I can pretend to be, is of opinion that words of the order fixed the day, not for the settlement of the issues, but also he final determination of the case. This so, inasmuch as the parties certainly not agreed upon all the questions of or fact which might arise upon the basis the plaint, it was incumbent upon the rdinate Judge in the first instance to fix issues. And having fixed the issues, he t proceed to trial upon such evidence as parties were then prepared to put before Court. And, in the event of that evi- ce not being sufficient to enable the Court me to a satisfactory decision of the case tween the parties, the Court was bound postpone the further hearing of the case der that the parties might be enabled to ce evidence, unless, as was the case , the day was the day fixed for the final rmination of the case, and the failure to ce evidence on the part of one of the was without sufficient cause. If, re, the Judge had in this case proceeded regularly, he would have fixed the issues, and taken such evidence as was available; and then, if he thought that the plaintiff had not produced evidence sufficient to support his case, and had failed to do so from fault of his own, without sufficient cause, he would be justified in dismissing the suit. He has, in fact, dismissed the suit, as we have already said, on the ground that "no proof of non-possession has been adduced "by plaintiffs;" but, before giving his judgment, the Subordinate Judge had not formally fixed any issues between the parties. Probably no real injustice would be caused by this omission only, because it was very plain upon the face of the plaint itself that the principal issue which had to be tried between the parties was the issue whether or not the plaintiff had been deprived of the enjoyment and the usufruct of the land mortgaged to him, at the time and in the way which he alleged in his plaint. And probably it is to an issue of this kind that the Subordinate Judge refers when he says that "no proof "of non-possession has been adduced by "plaintiffs." Still the Subordinate Judge would not be justified in dismissing the suit simply upon the failure of evidence on the part of the plaintiff; he must also have good reason to be satisfied that this failure was due to the fault of the plaintiff himself. The Subordinate Judge has not said that he was of opinion that the non-production of evidence was due to the fault of the plaintiff without good cause; nor has anything been brought to our notice which should lead us to think that that must have been the finding of the Judge. There is on the contrary some ground, we do not say how much it is worth, upon which the plaintiff might excuse himself from bringing evidence at the first hearing, notwithstanding the summons fixed this day for the settlement of issues and for the determination of the case; because the defendant had not, up to that time, filed any written statement at all, and the plaintiff must have been entirely unaware of what the line of defence would be. Unless, therefore, the plaintiffs were expected to bring the whole of the evidence by which to establish all their allegations in suit on the first day, they might possibly be in reason allowed to say they did not understand that they would be called upon to prove every part of their allegation before the defendant had filed any written statement whatever. It may be that, in the proceedings in this case, there was enough to justify the Judge in thinking that the plaintiffs were bound to be ready

with all their evidence on the first hearing. But he has not stated that this was so. And we repeat that we have not the means of judging whether this was so or not.

On the whole, we think that the only course open to us is to reverse the decision of the lower Court, and to send back the case for re-trial. And we shall direct the Judge to fix in the first instance the issues which arise between the parties in this case, and then to proceed with the trial in due course.

Costs must abide the event.

The 3rd February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Admissions on behalf of a Minor—Duty of Court.

Case No. 100 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 19th December 1872.

Syud Abdool Hye, Manager under the Court of Wards, and another (Defendants), *Appellants,*

versus

Baboo Banee Pershad (Plaintiff), *Respondent.*

Baboo Unnoda Pershad Banerjee and *Romesh Chunder Mitter* for Appellants.

The Advocate-General and *Baboos Mohesh Chunder Chowdhry* and *Chunder Madhub Ghose* for Respondent.

It is incumbent upon a Court, which is called upon to try an issue between a person of mature years and an infant, to take care that facts essential to his adversary's case are not unadvisedly admitted on behalf of the infant. The Court should take nothing as admitted against an infant party to the suit unless it is satisfied that the admission is made by some one competent to bind the infant, and fully informed upon the facts of the matter in litigation.

Phear, J.—We have heard very full and earnest argument in this case in support of the decision which the Court below has come to. But nevertheless it appears to us that there has as yet been no real trial between the plaintiff and the infant, who is the principal defendant in this suit.

The plaintiff sues three persons described as follows: *1st,* Moonshee Syud Abdool Hye, manager under the Court of Wa*2nd,* Doolhin Perbhooraj Kooer, guardi Baboo Desputty Singh, minor; *3rd,* B Reetbhunjun Singh.

The 1st defendant appears to have b made a party to the suit, because he is in actual manual possession of the prop which is the subject of suit.

The 2nd defendant must be intended the infant Desputty Singh.

And the 3rd defendant is one Reetbhu Singh, who is sued on his own account.

We say the 2nd defendant *must* be infant Desputty Singh, because this is m of inference only, inasmuch as the pla does not conform to the directions of sec 69 of Act IV. of 1870 (B. C.) which says in every suit brought against a ward, shall therein be described as a ward of Co and if he have a manager of his estate, manager shall in such suit be named a guardian, and no other person shall be na as guardian in the suit by any Civil C in which such suit may be pending.

The allegation is made in the body of plaint that Desputty Singh, the minor, ward of the Court of Wards But plaintiff has not in form designated him defendant and ward of Court, or profe to sue him by his guardian, the manage the estate under the Court of Wards. plaintiff, if he does make the minor def ant at all, professes to sue him as represe by Doolhin Perbhooraj Kooer, his guard And Doolhin Perbhooraj Kooer is certa not sued on her own account. We infer that it was the intention of the plainti sue the minor by his guardian Dool Perbhooraj Kooer, because it is the substa of the plaint that the property, which plaintiff seeks to make applicable to the p ment of his debt, is alleged on the part the minor to have descended to him as h of the last holder.

This being so, the persons who would expected to file written statements in suit, would be Syud Abdool Hye in defe of his possession of the property; Dool Perbhooraj Kooer on behalf of the min and Reetbhunjun Singh on behalf of hi self. Accordingly, we find that Syud Abd Hye does file a very short statement inde substantially in these words: That, in much as the management of the prope which is the subject of suit, has, under order of the Judge, devolved "on the Co "of Wards, agreeably to the said order "necessary for the Court of Wards to en

h

fence in this case. Under such circumnces, it is prayed that the case may be d with reference to the facts on the cord, and that no costs may be charged the Court of Wards."

his is clearly no defence on the part of minor whatever. Indeed, it could not ly be considered as a written statet filed on behalf of the minor. There t a word in it from the beginning to the which bears at all upon the minor's est, and no guardian of the minor would stified in filing such a written statement is. It amounts, if it amounts to anyat all, to a simple admission of the facts d in the plaint, and a request that the t of Wards might not be made liable e costs. If the rightful guardian of an t, after due consideration of his best ests, finds himself reasonably unable to est, on behalf of the infant, the facts h were set out in the plaint, he would ly say so, and leave the case to be dealt by the Court in the best exercise of its retion. The statement of Moonshee Syud ool Hye is something very different ed from this. It amounts to saying "You do exactly what you like with the case, only don't make the Court of Wards onsible for costs."

hen, as already stated, the person who ld be expected to file a written statement behalf of the minor, is the person whom plaintiff named in the record as the rdian of the minor. But it seems that Court would not receive a statement from lady Doolhin Perbhooraj Kooer in defence e minor.

is not necessary now that we should ll upon the different proceedings in this e antecedent to the final decision of the ordinate Judge. It is enough to say this lady applied more than once to be wed to file a written statement on behalf the minor, but was not permitted to do so. e consequence is that up to this day there o statement on the record which has been d as a statement of the minor's case.

The first hearing of the suit was originally d for the 19th September 1872. But, in equence of more than one application g made by the different defendants, it finally changed to the 9th December of same year. And, on that day, it seems one issue only was framed and settled, ely, the issue "Whether or not Desputty h, minor, was legally adopted by dessuree Pershad?" Now it requires very little consideration indeed of the plaint to perceive that this issue could not be arrived at, until nearly all the principal facts stated in the plaint as constituting the plaintiff's right of action had been admitted. We should have expected then to find that, on the day when the issues were framed between the plaintiff and the minor defendant in this suit, somebody or other, on the part of the minor defendant, undertook to admit for him very nearly all the essential parts of the plaintiff's case. We are very far from intending to say that the guardian of an infant defendant, if properly advised on all the circumstances surrounding the infant and his relations to the matter of the suit, cannot, on his behalf, admit facts essential to his adversary's case. It is, however, incumbent upon the Court, which is called upon to try an issue between a person of mature years and an infant, to take care that nothing of this kind is done unadvisedly. It should take nothing as admitted against an infant party to the suit, unless it is satisfied that the admission is made by some one competent to bind the infant, and fully informed upon the facts of the matter in litigation. As far as we can learn from what took place on the day when the issues were settled, we certainly find no warrant for assuming that the Court was justified in accepting, on behalf of the infant defendant, any admission whatever of facts essential to the plaintiff's case. The lady who was named on the record by the plaintiff himself as the person who should be the guardian of the infant in the suit was certainly not present on that occasion. And who else could have made admissions on behalf of the defendant, we are certainly unable to see. The learned Advocate-General pressed upon us very earnestly that, according to the statement of the case made by the plaintiff himself, the Court of Wards was the proper person to appear and defend on the part of the infant. Yet strangely enough the plaintiff does not, in his plaint, make the Court of Wards the guardian in this suit of the infant defendant's interest. And, as has been already mentioned, although the manager appointed by the Court of Wards was a defendant, he did not even profess to undertake, in any way, the defence of the minor's interests. Therefore, so far as we can see, there has been, in the matter of this suit, an entire assumption of the truth of the plaintiff's case in its principal particulars as against the infant defendant without there having been any person whatever before the Court who either

professed or was competent to bind the infant in the matter.

We learn further from the record that, even so late as the day on which the decision was given, the lady Doolhin Perbhooraj Kooer named by the plaintiff as guardian of the minor was anxious to put in a written statement of the facts which constituted his defence. But the Court would not allow her to do so, although it is plain from the order of the Court, which was made on the same day, that this lady was then not only the person named on the record by the plaintiff as the guardian of the infant, but was, in fact, the proper person to be entrusted with the defence of his interests in this suit; because the Collector had, by that time, informed the Subordinate Judge that this lady was duly authorized and had received the sanction of the Court of Wards to appear on behalf of the minor, and the Subordinate Judge himself had admitted her to assume this character on the record by virtue of this communication from the Collector. It is somewhat strange that, notwithstanding the Subordinate Judge thought he was bound to recognize this lady's character on the record as guardian of the minor, he nevertheless refused to allow her to put upon the file a written statement of the facts which, in her judgment, constituted the defence of the minor. The consequence has been that, not only was there no one present at the time when the issues were settled who was competent on behalf of the minor to admit all that has been assumed by the Court to have been admitted on that occasion, but there had been no real representation of the minor in the trial which eventually took place. The decision of the Court was given on the 19th December 1872, but there is nothing on the record to show that any one appeared before the Court on that day ready to place evidence before the Court, or to inform it even upon the narrow issue which had previously been fixed.

Under all these circumstances, it seems to us that there has been really no trial between the plaintiff and the infant defendant, and that consequently the decision of the lower Court must be reversed, and the case remanded for re-trial. The lady must be treated as one now unquestionably on the record in the character of guardian of the infant defendant, and she must be allowed an opportunity of filing a written statement in his defence. When that written statement shall have been filed, or a reasonable time prescribed for that purpose shall have expired, then the Court must frame settle fresh issues between the parties, proceed to the trial of the case.

The costs of this appeal must abide event.

The 2nd December 1873.

Present:

The Hon'ble F. B. Kemp and W. Ai *Judges.*

Act VIII. of 1859, s. 246—Judgment int partes—Issues.

Case No. 275 of 1872.

Regular Appeal from a decision passe the Subordinate Judge of Rajsh dated the 16th July 1872.

Booliroonnissa Bibee (Defendant), *Appellant,*

versus

Kureemoonnissa Khatoon (Plaintiff), *Respondent.*

Baboos Sreenath Doss and *Kashee K Sen* for Appellant.

Mr. R. T. Allan and *Baboo Bhowan Churn Dutt* for Respondent.

Where a claim made under Act VIII. of 1859, s. is disallowed, the order disallowing it does not mine the question involved, *e. g.*, the *bona fides hiba-bil-ewus* for all purposes or with general e but is merely *quoad* the particular claimant who obtained the order.

In such proceedings, where the judgment-debto the claimant are put in the position of co-defendant in a regular suit, no issue can be disposed of be them.

Ainslie, J.—THE appellant and respon in this case both appear to be wives of Kader Ali Chowdhry; at least the appe Booliroonnissa claims to occupy the posi of a wife, and it is unnecessary to deter whether her claim to that position is a one or not. It appears that she obtain decree in 1870 against her husband K

for the dower alleged to be due to her as d at the time of her marriage in the galee year 1257. The decree was put execution in 1871, and those proceedings s led to this suit by Kureemoonnissa, claims to have been married to Kader on the 9th of Cheyt 1260, and to be led to a dower of Rs. 50,000, the half which was immediate, and who states , in satisfaction of this portion of her er, a *hiba-bil-ewuz*, duly registered on 1st of May 1854, had been given by her and, whereby the properties Nos. 1 to 21 chedule "क" were assigned to her. She also claimed the two other properties in econd Schedule "ख" on the allegation they are self-acquired properties, and Booliroonnissa could not proceed against in execution of her decree against der Ali.

he lower Court has given a decree in ur of the plaintiff, from which Mussamut liroonnissa appeals. The grounds of eal are limitation; that the whole of the gment is against the weight of the ence; that the *hiba-bil-ewuz* was made the defendant No. 1 to defraud creditors; d that there is no finding of the Court ow in respect of what the plaintiff alleges be her self-acquired property. There was a point of Mahomedan Law taken in the unds of appeal, which, however, has not n pressed, and clearly could not be pressed; even if we assume, for the purpose of ument, that Mussamut Booliroonnissa is wife of Kader Ali, there is no evidence tsoever to support the allegation that she married to Kader Ali before his marriage the plaintiff, or that there was any child n before that time.

The first question as to limitation arises of an order made on the 9th of March 3 under section 246 of Act VIII. of 59 at a time when Gooroo Pershad uckerbutty was proceeding to execute a ree against Kader Ali. Mussamut reemoonnissa intervened under that sec-, but the Court disallowed her objection, d ruled that the sale must proceed. As a tter of fact, no sale was held, the decree g otherwise satisfied. This order is ed upon as determining the question of *bona fides* of the *hiba-bil-ewuz* finally all purposes, inasmuch as no suit has ever n brought to set the order aside. There a judgment reported in 8 Weekly porter, page 27, in which Mr. Justice pherson, who delivered the judgment of the Court, disposes of this objection in the most complete manner. It is hardly necessary for us to refer to it at length now, as it has been read over during the hearing. The passage we refer to will be found in page 28 at the top of the second column beginning "when a claim is made under section 246 ....."

Then it is said that, although the order may not have general effect, and may not be binding in respect of others, still it is conclusive in this case, as both Kureemoonnissa, the present plaintiff, and Kader Ali, the present defendant, were parties to those former proceedings. The answer to this may be taken from the words of section 245. That section says: "In the event of any "claim being preferred to, or objection offered "against, the sale of lands, or any other "immoveable or moveable property which "may have been attached in execution of a "decree, or under any order for attachment "passed before judgment, as not liable to be "sold in execution of a decree against the "defendant, the Court shall, subject to the "proviso contained in the next succeeding "section, proceed to investigate the same "with the like powers *as if the claimant "had been originally made a defendant to "the suit.*" Now, the effect of this is to put the judgment-debtor and the claimant in the position of co-defendants, and, as between co-defendants no issue can be disposed of, the decision of the Court must be between a defendant on one side and a plaintiff on the other side.

We next take the question of the genuineness and validity of the *hiba-bil-ewuz*. This document was made so far back as in the year 1260, or in April 1854, and it was registered within a month after its execution. There is a good deal of evidence on the one side to show that there was really and truly a settlement made upon Kureemoonnissa at the time of her marriage, and that this *hiba-bil-ewuz* was given in satisfaction of that part of her dower which was immediate, and there is not a particle of evidence on the record to show that at that time there was any fraud, or likelihood of fraud, or any reason whatsoever why Kader Ali should make a fraudulent disposition of his property. It is not shown that he has been insolvent at any time. Some attempt was indeed made to show that some years later there were some small debts due by him, but the evidence of this is quite insufficient to make out a case of insolvency. As already observed, these debts were incurred

some years later, and, at the time of his marriage, it would seem, as far as this record enables us to judge, that he was absolutely unincumbered.

The question whether the finding is against the weight of the evidence in other respects thus becomes comparatively immaterial, for it is quite clear that Kureemoonnissa is entitled to recover upon her *kabinnama*, even supposing that she had not already got into possession. A case in Volume II. Bengal Law Reports, page 307,* has been cited as authority to show that a creditor for dower is entitled to come in and have her claim satisfied *pari passu* with secured creditors, but this is a case where an unsecured creditor has endeavoured to take his remedy over a secured creditor. On the evidence which is in quantity very considerable, in quality perhaps not so good as it might be, it is clear that, although the management of the property may, to some extent, have remained with Kader Ali, yet the enjoyment of the rents was in Kureemoonnissa herself. There is nothing in the manner in which the property was dealt with to show that the settlement on his wife by Kader Ali was a mere sham. In respect of the two properties Nos. 22 and 23 in the Schedule marked "ख," that is to say, the fractional putnee talooks in Mehal Bhootiadar and Kismut Dattabaree, we are of opinion that the plaintiff ought to fail. It is perfectly true that the receipts for rent paid are in her name, and that there is evidence that the rents were paid to her, but there is no satisfactory evidence that she disbursed one pice of the money paid for acquiring these putnees, and there is no account whatever of the causes that led to the name of her husband Kader Ali being used, if she herself was really the putneedar. What evidence there is on this point is to be found at pages 28, 29, 33, and 34 of the printed record. The witness Rokhnee Kant Acharjee says that he was not present at the time of giving the putnee, but that it was purchased with Kureemoonnissa's money: he says: "I saw this." When and how, it is difficult to say, or rather it would have been difficult to say, if he had not himself explained what he meant, for, in cross-examination, he says: "I speak on assumption that the money was Kureemoonnissa's; I say so from sight of those papers, that is, the papers belonging to Mr. Barry." Then the next witness, 'Abed Ali Khan, only says: "I hear that "the putnee of Bhootear Dyor Mehal "taken by giving Kureemoonnissa's mon and then "the purchase-money for it "paid by Sufdur Ali Meah." It may quite true that the purchase-money was by Sufdur Ali Meah, but that does not p that it belonged to Kureemoonnissa. T Mustafa Khan says that the purchase-mo was given by Sufdur Ali on the pa Kureemoonnissa, and Banee Madhub Bag on the part of Mr. Barry; and then fu on: "I saw that Sufdur Ali brought purchase-money from the kootee grantin receipt for it." Then on cross-examinat "I have never seen Kureemoonnissa." this gentleman knew that the purch money came from Kureemoonnissa, bec it came out of the hands of Sufdur Ali, are not informed. Then the next wit Mobaruk Khan, states in a similar general manner that the purchase-mo was given by Sufdur Ali on the pa Kureemoonnissa; that is all he says that. How far his knowledge of Kureem nissa's affairs extends may be gathered an answer which he makes on cross-exa ation. On being asked as to Kureemoon giving the ijaras of this property, says: "I hear that Kureemoonnissa ijaras." Then there is the deposition Madhub Chunder Chuckerbutty, one o parties who gave the putnee of Dattab Now his evidence might have been valuable, but it comes really to nothing. says: "I gave it in putnee to Mr. B and Kureemoonnissa;" not one word is a of this witness as to the reason for using name of Kader Ali in lieu of the nam Kureemoonnissa. Then he goes on: " purchase-money for the same was give Kureemoonnissa's man, Huree Booyiah;" he explains on cross-examination: "B Madhub Bagchee says that the money given from Kureemoonnissa's tuhvil, and he heard from Banee Madhub Bagchee Huree Booyiah is Kureemoonnissa's serva This really is no evidence that the mo came out of Kureemoonnissa's hand; an was for the plaintiff, who admits that the t deeds do not stand in her name, to s clearly that the property was acquired herself and at her own expense. So therefore, the decree of the lower C ought to be amended. We accordin modify that decree by striking out of it two properties Nos. 22 and 23 of the Sched "ख."

The respondent will recover from appellant the costs of this appeal in full.

* 11 W. R. 212.

The 31st January 1874.

Present:

James W. Colvile, Sir Montague E. Smith, Sir Robert P. Collier and Sir Lawrence Peel.

Mortgage—Partition (Butwara)— Remedy of Mortgagee—Regulation XIX. of 1814.

*Appeal from the High Court of Judicature at Fort William in Bengal.**

Byjnath Lall

versus

Ramoodeen Chowdry.

Where the owner of an undivided share in a joint undivided estate mortgages his undivided share, he does not, by so doing, affect the interests of the other sharers, and the persons who take the security, *i. e.*, the mortgagees, take it subject to the right of those sharers to enforce a partition, and thereby convert what is an undivided share of the whole into a defined portion held in severalty.

Where such a partition is effected under the provisions of Regulation XIX. of 1814 before the mortgagees have completed their title by foreclosure and the consequential decree for possession, the mortgagees of the undivided share of one co-sharer who has no liability of contract with the other co-sharers would have recourse against the lands allotted to such co-sharers; they must pursue their remedy against the lands allotted to the mortgagor, and, as against him, would have a charge on the whole of such lands.

The suit out of which these appeals have arisen was brought by the appellant to recover possession, and be registered as proprietor of various parcels of land, all of which once belonged to one Gopal Narain Singh, deceased, but had afterwards been purchased by different persons at several sales in execution of decrees against him. The defendants were the representatives of Gopal Narain Singh and the several auction-purchasers; and the title on which the plaintiff sued was based upon a deed of mortgage by way of conditional sale alleged to have been executed to him by Gopal Narain Singh; and upon the proceedings subsequently taken under Regulation XVII. of 1806 to foreclose that mortgage.

The principal defences raised in the suit, and indeed the only defences now to be considered were: *1st*, that the mortgage-deed having been made collusively and without consideration was fraudulent and void as against the auction-purchasers; and, *2nd*, that, even if it were good against them, it conferred no title on the plaintiff to several of the parcels claimed by him.

The Principal Sudder Ameen who tried the cause in the first instance decided the first question in favour of the plaintiff, and gave him a decree for the lands claimed with the exception of some which are now no longer in dispute.

Against this decree, which bears date the 8th of January 1866, the different defendants presented four separate appeals, the plaintiff also preferring a cross-appeal, to the Judge of Zillah Tirhoot. That officer, on the 14th of June 1867, decided that the plaintiff had failed to establish that the mortgage-deed was executed *bonâ fide*, and dismissed the suit. His decree was, however, reversed on special appeal by a Division Bench of the High Court, which transferred the regular appeals for final hearing and decision to itself. There is no further trace of plaintiff's cross-appeal; but the appeals of the different defendants were separately numbered in the High Court as Nos. 96, 100, 101, and 102, and were heard by this Division Bench, consisting of Mr. Justice Kemp and Mr. Justice Elphinstone Jackson, which made a separate decree in each. On appeals Nos. 96 and 101, the two Judges were divided in opinion, Mr. Justice Kemp holding that the mortgage was a fictitious transaction in which no consideration passed, and that the suit ought, on that ground, to be dismissed generally; and Mr. Justice Jackson holding that the mortgage-deed was executed *bonâ fide* and was valid, but that the plaintiff could recover only such of the parcels claimed as were specifically mentioned in the deed. Accordingly, each of the decrees originally made on these appeals stated that the Senior Judge had given a decree for the dismissal of the suit; but that the Junior Judge dissented therefrom, and was of opinion that the plaintiff ought to have a decree for certain of the lands claimed, inasmuch as they were included in the mortgage-deed; but that his claim to others, which were held not to be covered by the deed, should stand dismissed.

In deciding the appeals Nos. 100 and 102, the two Judges concurred in the dismissal of the suit as against the parties appellant, on the ground that none of the lands sought to be recovered from them were covered by the mortgage-deed; touching the validity of which they expressed no opinion.

*From the judgment of Peacock, C.J., and L. S. Jackson and Macpherson, JJ., in Appeal No. 1 of 1869 under section 15 of the Letters Patent, decided on the 1st December 1869.

In this state of things there was a reference to a Full Bench of the High Court, which held that it was only competent to deal with the two appeals in which the Judges had expressed conflicting opinions, and with the particular point on which they differed. And having thus limited the reference to the appeals Nos. 96 and 101, and to the question of the *bona fides* and validity of the mortgage-deed, it decided that question in favour of the plaintiff (the present appellant). The result was that the final decrees upon all the appeals were drawn up in accordance with the principle laid down by Mr. Justice Jackson. The plaintiff appealed to Her Majesty in Council in each case; but the four appeals were afterwards consolidated, and have been heard as one appeal by their Lordships. Of the respondents those only who were appellants in Nos. 100 and 101 have appeared here by Counsel.

Mr. Doyne, on their behalf, insisted that, although they had filed no cross-appeal, they were nevertheless entitled to impeach the validity of the mortgage-deed, on the ground that their appeals were never before the Full Bench of the High Court, and consequently were not affected by the last decree. Their Lordships do not think it necessary to examine very nicely into the question of right, because they are of opinion that, if the right be conceded, no sufficient grounds for coming to a conclusion upon the *bona fides* and validity of this deed other than that in which the Principal Sudder Ameen, one of the Judges of the Division Bench, and the three Judges who composed the Full Bench of the High Court, have concurred have been laid before them. There may be in the transaction circumstances of suspicion arising out of the position in life and presumable means of the plaintiff; but there is no evidence on which their Lordships would feel justified in overruling so many concurrent judgments.

This disposes of the first defence raised in this suit; and the only remaining question is whether the principle applied by Mr. Justice Jackson is correct; or whether the High Court ought to have affirmed the decree of the Principal Sudder Ameen in its integrity.

To elucidate this question, which is both novel and difficult, it is necessary to consider the facts of the case somewhat more in detail.

Gopal Narain Doss, the mortgagor, was, on the 24th of September 1860, when he executed the deed of conditional-sale, the undisputed owner of an 8-annas undivided share in an estate consisting of three uslee mouzahs, called Gunniporebija, Pemburin and Tajpore Ruttumpur, to each of wh certain dakhilee villages were appurten The deed describes him as propri of 8 annas severally of the two mouzahs, and inhabitant and shareho proprietor of 8 annas of Tajpore tumpore, and some argument was sought be raised on this distinction. Their L ships, however, conceive that the utm which it imports is that he may have lected his share of the rents of the two mouzahs separately, and the rents of other mouzahs jointly with his co-parcen it being perfectly clear from what afterw took place that his interest in the wh estate was an undivided moiety. In state of things he executed a conditional of "the whole and entire 8 annas out of whole 16 annas severally of Mou Gunniporebija and Pemburinda," as a se rity for the sum of Company's Rs. 26,0 expressly excepting from the operation of deed the 8 annas of Tajpore Ruttump and certain bromuttur* and other la devoted to religious or charitable purpose

Before the execution of this mortga and, as early as September 1858, some of other sharers in the estate had commen proceedings to effect a butwara, or partit of the whole estate, under the provisions Regulation XIX. of 1814. The us proceedings were had, not, as appears fr the Collector's proceeding dated the 3 July 1862, without disputes between t co-sharers, and objections on the part Gopal Narain Singh in particular. T partition was finally made by the last-me tioned proceeding, which was duly confirm by the superior Revenue authorities. effect as regards Gopal Narain Singh was allot to him, to be held in severalty, and lieu of his undivided moiety of the wh estate, the whole of Mouzah Pemburind the whole of the principal Mouzah of T pore Ruttumpore, with a 2 annas and gundas share of its dependency Mouz Mudwee, the whole of Mouzah Moustafapo or Joysingpore, a dakhila or dependency Gunniporebija, and thirty-six beeghas a odd cottahs of other land in the last-name principal mouzah.

Gopal Narain Singh was duly put in separate possession of these parcels.

He did not, however, long remain in possession. On the 24th of December 186 his right, title, and interest in Mouza Pemburinda was purchased at an executi sale by Hurreehur Chowdry, now represent

the respondent Ramoodeen Chowdry and other persons, who are said to have ce come to a compromise with the appel- t. The one-third share of the last-named pondent in the land so purchased was the ject of the appeal No. 96.

On the 8th of December 1864, the right, , and interest of Gopal Narain Singh in uzah Moustafapore was in like manner chased at an execution-sale by the pondent Ramanoograh, and the land luded in that purchase was the subject he appeal No. 101.

On the 23rd of December 1862, the right, , and interest of Gopal Narain Singh in uzah Tajpore Ruttumpore was purchased an execution-sale by the respondents, ulvie Mahomed Ahsun and Kashee Pershad gh, and the land included in that purchase the subject of appeal No. 102.

And on the 7th of February 1865, the ht, title, and interest of Gopal Narain gh in the portion of Mudwee, which was tted to him on the partition, was purchased another execution-sale by the respond- Mohunt Parsoo Ram Doss, and that rcel of land was the subject of the appeal o. 100.

In the meantime the appellant had oceeded to foreclose his mortgage. The oceedings taken for that purpose began on 12th of December 1863, and the final er for foreclosure was obtained on the 12th December 1864. Their Lordships think is established by the evidence that all the rchasers under the execution-sales, except Mohunt whose purchase was subsequent to foreclosure, had due notice of these pro- edings.

The Principal Sudder Ameen's decree ve to the appellant the whole of Mouzah mburinda, the whole of Moustafapore, 8 nas of Mouzah Tajpore Ruttumpore, and 3 beeghas and a fraction of Mouzah udwee, to which quantity, for reasons hich are not now impeached, he reduced the pellant's claim.

The decrees under appeal disallowed the pellant's claim to any portion of the two ter parcels, and gave him only one-half of e share in Pemburinda, which he claimed as gainst the respondent Ramoodeen Chowdry, nd only 8 annas of Moustafapore.

The principle for which the appellant ntends, and that on which the Principal dder Ameen proceeded, is that the mort- gee is entitled to whatever was allotted to mortgagor on the partition in respect or in stitution of his undivided 8-annas share in Mouzahs Gunniporebija and Pemburinda, which was the subject of the mortgage, and that this includes all the parcels now in dispute.

The principle on which the High Court has proceeded, and for which the respondents contend, is that the appellant can recover nothing which is not expressly named in, and covered by, the mortgage-deed, and consequently that he can take no part of Mouzah Tajpore and its dependencies, and only an 8-annas share of Mouzah Pemburinda, and an 8-annas share of Moustafapore, the latter being the only portion of Mouzah Gunniporebija, which is in dispute.

It will be convenient to consider, first, what in such a case would be the rights of the mortgagee against the mortgagor; and next, whether the respondents stand in any better position than the mortgagor.

Now, what was the subject of this mortgage? It was an undivided moiety in two out of three villages forming a joint and undivided estate. The sharers, however, do not appear to have been members of a joint and undivided Hindoo family, but to have enjoyed their respective shares (at all events their shares in Gunniporebija and Pemburinda) in severalty. It is therefore clear that the mortgagor had power to pledge his own undivided share in these villages; but it is also clear that he could not, by so doing, affect the interest of the other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty.

The partition which actually took place in this case was not one which had for its sole object the division of the joint estate by metes and bounds, an object which might be effected by the private agreement of the parties. It had for a further object the apportionment of the public revenue assessed on the whole estate, so as to relieve each proprietor from the obligation to pay that revenue *in solido*, and to make him responsible only for the amount to be charged on his separate and defined share. To such a partition the State necessarily became a party for the protection of the revenue, and it was one which could only be effected by the machinery of the Regulation. The provisions of Regulation XIX. of 1814 appear to their Lordships to have been carefully designed to secure a fair partition of the estate to be divided. The division is to be made, in ordinary cases, by a public officer

(the Ameen) acting under the orders of the Collector. Even if, under the 22nd section, the terms of the partition are proposed by the parties, or referred by them to arbitration, the law still requires the intervention of the Ameen, before whom the accounts are to be produced and verified, and in whose presence and subject to whose inspection the division is to be made. When the terms have been so settled they must be sanctioned by the Collector, and afterwards by the superior Revenue authorities. The partition, after it has been so sanctioned, is declared by section 20 to be final, subject to the power reserved to the Governor-General in Council, by section 25, of directing a fresh apportionment of the revenue in cases of proved error or collusion at any time within ten years after the confirmation of the partition.

Let it be assumed that such a partition has been fairly and conclusively made with the assent of the mortgagee. In that case, can it be doubted that the mortgagee of the undivided share of one co-sharer (and, for the sake of argument, the mortgage may be assumed to cover the whole of such undivided share), who has no privity of contract with the other co-sharers, would have no recourse against the lands allotted to such co-sharers; but must pursue his remedy against the lands allotted to his mortgagor, and, as against him, would have a charge on the whole of such lands. He would take the subject of the pledge in the new form which it had assumed.

It appears, however, to have been settled by decisions, and upon the construction of the regulations, *first* that no such partition can be disturbed by a Civil Court; and, *secondly*. that a mortgagee who has not perfected his title by foreclosure, and the consequential decree for possession, can neither compel a partition nor be a party to the butwara-proceedings. And this latter point has been the foundation of one of the principal arguments addressed to their Lordships by the learned Counsel for the respondents.

It was argued that, as the mortgagee could not be a party to the butwara-proceedings, so, upon general principles of jurisprudence, he could not be held to be bound by them; that, consequently, he was at liberty to enforce his rights against an undivided share in every parcel specified in the mortgage-deed to whichsoever of the co-sharers such parcel might have been allotted, but that he could not claim more. The objection that, in such a case, he must either forfeit part of his security, or pur his remedy against those with whom he no privity of contract was met by suggestion that the co-sharers thus injurio affected would, upon the principle of impl warranty such as exists in this country o title acquired by partition or exchange, h a remedy over against the mortgagor, eve the consequence of that were the re-open of the partition. And it was further arg that, if the contention of the appell concerning a partition by butwara w correct, it must be equally true of a partit by private arrangement; and that in ei case an unequal partition might be effec by collusion between the mortgagor and co-sharers with the object of defrauding mortgagee.

Upon this it is to be observed that fr would be a substantive ground for re and that, if the fraud supposed were effec by private arrangement, the mortgagee wo have a clear remedy against all who w parties to it in the Civil Court.

In the more improbable case of such fraud being effected by means of butwa proceedings, his remedy might be m difficult by reason of the finality of partition, and the incapacity of the C Court to entertain a suit to disturb it. E without entering into these nice questio which do not directly arise on this appe their Lordships deem it sufficient to obse that the finality of such a partition can be greater than that of the purchase of estate at a sale for arrears of the pub revenue; and that, even in this latter ca Courts of justice have found the means relieving the person injuriously affected fraud. (See the case of Nawab Sidh Nuzur Ali Khan *vs.* Rajah Ojoodhyar Khan, 10 Moore's I. A. 540.)* In su cases, however, the alleged fraud is t foundation of the suit, and it is difficult see upon what principle, in the absence that or some equivalent cause of action, t mortgagee, who could not have sued t co-sharers for a partition, could have a remedy against them or their separat shares, which, under the butwara, h become distinct estates. And if he does n claim to have such a remedy, but is conte to claim, as the subject of his security, th which his mortgagor has received in subs tution of the original pledge, it is st more difficult to see what right the mortgag can have to resist such a claim, or to say,

*5 W. R. (P. C.) 83.

ng in possession of the new estate, insist your being limited to the old.
n the present case there is not a suggestion fraud, nor is there any ground to suppose the partition was other than fair and al. The mortgagee is content to accept it has been allotted in substitution of the vided interest as the fair equivalent of Their Lordships are of opinion, not only he has a right to do so, but that this, in circumstances of the case, was his sole t, and that he could not successfully sought to charge any other parcel of estate in the hands of any of the former harers. There is, therefore, no question of election, or of the time when the tion was made.
distinction has, however, been taken een the parcels in the possession of the ondents Ramoodeen Chowdry and Rama-rah Sahoy, and those in the possession he Mohunt and of the respondents omed Ahsun and Kashee Pershad Singh, he ground that the latter are portions of Mouzah Tajpore Ruttumpore, which was essly excluded from the security. It is inly possible to conceive cases in which, security not covering the undivided e in the whole estate, it might be cult to determine which of the lands ted in substitution of that share repre-ed the mortgage-premises. No such culty, however, exists in the present inasmuch as the whole of Tajpore umpore was allotted to Gopal Narain h on the partition. He was already led to an eighth undivided share in this zah, which, being excluded from the gage, is not claimed by the appellant. it follows from this that whatever ion of this mouzah was allotted to him excess of those 8 annas must have so allotted in substitution of his interest he Mouzahs Gunniporebija and Pem-nda, and, therefore, became subject to mortgage. Their Lordships, therefore, of opinion that, if all the parcels in ate were still in the possession of Gopal ain Singh, he would have no defence to appellant's claim in respect of any of

he only remaining question is whether respondents, other than the represent-s of the mortgagor, are in a better ion than he would have been. They all mere purchasers at execution-sales right, title, and interest (the Mohunt chasing at a date subsequent to the final closure), and could acquire no higher rights than he possessed at the date of the purchase. In respect of such purchases, the question whether they were made with notice of the appellant's title is not very material; but, if it were, there is no doubt that they were made with such notice. Not only was the mortgage-deed registered, but all the respondents, except the Mohunt whose title had not then accrued, seem to have been served with notice of the foreclosure-proceedings, and might have claimed the right to redeem. They had also notice of the partition. To say that they were deceived by the description of the mortgaged premises, is to affirm, not that they had no notice of the appellant's superior title, but that they mistook its legal effect.

Their Lordships are, therefore, of opinion that the decree of the Principal Sudder Ameen was right as against all the respondents; and they will humbly advise Her Majesty to reverse all the four decrees under appeal; and, in lieu thereof, to make a decree dismissing all the four appeals, and affirming the decree of the Principal Sudder Ameen with the costs of the proceedings in the High Court. The appellant must also have the costs of these appeals.

The 5th February 1874.

Present :

The Hon'ble F. B. Kemp and F. A. Glover *Judges.*

Possessory Suit—Ejectment—Determination of Tenancy.

Case No. 122 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Dinagepore, dated the 26th February 1872.

Amar Chand Lahata (Plaintiff), *Appellant,*

versus

Kooer Hurendro Narain Singh and others (Defendants), *Respondents.*

Mr. L. P. Pugh and *Baboos Rash Beharee Ghose* and *Gooroo Doss Banerjee* for Appellant.

The Advocate-General and *Baboos Gopal Lall Mitter, Mohinee Mohun Roy,* and *Romesh Chunder Mitter* for Respondents.

In a suit by a putneedar for a declaration of his rights, and to obtain khas possession with costs and interest, on the allegation (which was found to be false) that he had

been in khas possession, and had been forcibly dispossessed by the defendants, where it was found that the zemindar, through whom plaintiff's title was derived, as well as his ijaradar, had received rents from the defendants as jotedars:

HELD that plaintiff had no right to treat defendants as trespassers, and sue for direct possession; and was not entitled to determine their tenancy without proceeding to do so in a legal manner, and that, as plaintiff had made a false allegation ignoring the tenancy of the defendants, his suit was properly dismissed.

Kemp, J.—THE plaintiff in this case, a mohajun of the town of Moorshedabad, claims to recover direct possession of a very large area of land 8,250 beeghas, and he also prays to have his title declared. The title of the plaintiff is that of a putneedar, and, as such, it is not disputed by the defendants. The putnee under which the plaintiff claims was created in the year 1274 B.S. The plaintiff obtained that putnee on payment of a bonus of Rs. 16,001, the sudder jumma payable being Rs. 6,756-11, and the total jumma receivable from the putneedar being Rs. 7,656-11. The plaintiff states that, after receiving the putnee from the zemindar, and on the expiry of the ijara-lease which had been granted by the zemindar prior to the putnee, and which lease expired in Bysack 1276, he was in khas or direct possession of the whole of the lands included in the present suit; that, under cover of a proceeding under section 318 of Act XXV. of 1861, the defendants forcibly ejected the plaintiff, setting up a fabricated title to the said lands. The prayer of the suit was for a declaration of the plaintiff's rights, and to obtain khas possession from the defendants with costs and interest. The land claimed is described in a schedule appended to the plaint as comprised in eleven lots within specified boundaries, and there is a postscript to the plaint which gives the cause of action, which is stated to be the obstruction by the defendants of the khas or direct possession of the plaintiff from the 4th of October 1869, the date of the Joint Magistrate's decision under section 318 of the former Criminal Procedure Code.

The written statement of the defendants is to be found at page 4 of the printed book. We may here observe that the defendants who appear in this case are Mr. Maseyk and Kooer Hurendro Narain Singh Bahadoor. Mr. Gray was originally made one of the defendants, but he does not defend the suit, and we are informed that he has parted with his interest to the defendant Maseyk, who has died since the institution of the suit, and is now represented by his widow. Kooer Hurendro Narain Singh Bahadoor, the other defendant, is said to derive his right to purchase from the defendant Maseyk, but, be that as it may, it is clear that the plaintiff has arrayed the three defendants Gray, Maseyk, and Hurendro Narain Singh Bahadoor as the maliks of the Goamaltee concern.

The written statement of the defendants is, as observed by the Judge, somewhat prolix. After taking the usual objections which are generally taken in the Mofussil Courts as to the boundaries not being correctly described, the plaint being vague and drawn, and as to certain necessary parties having been arrayed as defendants in the suit, the objections on the merits will be found at page 6 of the printed book.

We may observe before proceeding to the merits of the case that the objections in bar of the suit were overruled by the Subordinate Judge, and, we think, properly overruled. There is no cross-appeal on this point. On the merits the defendants enter into great detail. They state at page 3 of the printed book, para. 2, how the lands in dispute have been held by them as jummas, and they urge that the plaintiff is not entitled to eject them. The Subordinate Judge laid down several issues, to be found at page 9 of the printed book. Now, under section 139 of the Code of Procedure, the Court is not bound to lay down the issues according to the plaint or written statement, but the Court is at liberty to frame the issues from the oral examination of the parties or their pleaders. It does not appear that in this case the parties or their pleaders were examined, and the issues which were laid down by the Court were accepted by both parties. We have taken the trouble to ascertain that by referring to the record, and we find that the pleaders of both parties did sign the paper of issues as accepting the issues. The issues are, first, whether the suit was barred. That was disposed of in favour of the plaintiff. Then, whether certain jotedars ought to have been made parties, and whether in their absence the suit could proceed. That was also disposed of in favour of the plaintiff. Then follow the issues on the merits; what right has the defendants in the disputed lands, and is the plaintiff entitled to khas possession thereof; and whether the defendants have dispossessed the plaintiff from 8,250 beeghas of land by the award of the Magistrate in the case under section 318 of the Code of Criminal Procedure, which was for 5,49[illegible] beeghas, or not.

b

The Subordinate Judge has dismissed the intiff's case. He has found that, as the intiff comes into Court on the special alle-ion that the defendants are trespassers, as he has made no mention of the ndants having any right whatever to the uted land, and as he has failed to make a case of trespass or wrongful dispossess-, the plaintiff cannot be allowed to ceed on such a suit as this to have the t of occupancy of the defendants tried. e lands in dispute are situated in Turuf mpore Paharpore. These lands and r lands were resumed by Government 234 B.S. as towfeer lands, that is to lands in the possession of the zemindar, which formed no part of their estate at time they entered into engagements with Government for the decennial settlement. se lands belonged to Government, and, er the rules in force, they were open to lement at full rates with the parties led to enter into engagements with the ernment. It appears that, owing to the illingness of the zemindar to enter into agements with the Government in respect these lands, the zemindar having, in the instance, wished to take them at one-lf of the gross jumma, that is to say, at rate usually allowed to lakhirajdars, and Government having refused to accede to proposition, the lands in dispute, includ-other lands belonging to this mehal of mpore Paharpore, were leased out in n by the Government.

It is clear that in 1264 a detailed mea-rement was made by Government. The tailed chittas of that measurement have en filed, and a translation of them will be und commencing at page 70 of the printed ok. These chittas show that the lands re measured as in the occupation of jote-rs, and amongst these jotedars the principal edars are Mr. J. J. Gray, Mr. H. Cham-rs, Poresh Nath Singh, Pran Nath undul, Gunga Gobind Shah, Jomeut swas, Enayet Mundul, and Bishonath ah. A khutean of these chittas will be und commencing at page 120, and that utean shows that the principal jotedars of e estate were the eight men whose names e have already given. It is true that the ittas show a large number of dags, mounting to six hundred and odd dags, but is clear from the khutean that these sub-gs were in the occupation of the eight men med as jotedars.

Subsequent to this measurement, which ok place some eighteen years ago, in 1264 a permanent settlement was made with the zemindar (see settlement-proceeding at page 34 of the printed book from which we quote): "At the prayer of Chunder Narain "Roy, father and guardian of the minor "Jogendro Narain Roy, a permanent settle-"ment is effected with him from the 1st of "May 1859, corresponding with the begin-"ning of Bysack 1266 B.S., and an amul-"nama is granted to him, pending the "confirmation of the Commissioner."

When the permanent settlement was made with the zemindar by the Collector, the terms upon which that permanent settlement was made are embodied in a kubooleut executed by the aforesaid zemindar, to be found at page 135 of the printed book. Now, the terms, upon which the zemindar settled with the Government were that he was "not to dispossess the jotedars, and that he was not to resume the jote lands." Upon these terms the permanent settlement having been concluded with him, the zemindar took possession, and leased the mehal in ijara, which lease expired as already stated in 1276. We find it proved to our satisfaction that the zemindar received the rents from the defendants as jotedars; we further find it proved that the ijaradar of the zemindar also received rent from the jotedars, and we have also the fact that this suit is brought by the plaintiff on the false allegation that he was in khas possession of the whole of these lands, and that he was forcibly dispossessed by the defendants.

If this had been a case in which the zemindar had come in and claimed that which every zemindar has the *primâ-facie* right to claim, namely, to collect direct from the tenants the rent of every beegha in his zemindaree, and had said that the defendants had set up a right, such as a shikmee right or a mokurruree right or any other intermediate right between him and the ryots, which they did not in reality possess, and had asked the Court to decide upon the right, shikmee or otherwise, of the intermediate holder, then, as laid down in the case of Rajah Perladh Sein,* which has been quoted in the course of the argument, the *primâ-facie* right of the zemindar would throw the onus upon the intermediate holder to show under what title he held; but in this case the plaintiff clearly came into Court altogether ignoring the tenancy of the defendants; he did not admit in any way that such tenancy existed, but stated broadly that he was in khas possession,

* 12 W. R. (P. C.) 6.

and that he had been forcibly dispossessed by the defendants.

We have been asked in the present appeal to overlook the form of the suit as it was launched by the plaintiff in the first instance, and to decide upon the question which was said to be the main question at issue between the parties, namely, whether the plaintiff is entitled to eject the defendants or not. Many cases have been quoted during the course of the argument, in which it has been held by this Court that a party suing in the form in which the present plaintiff has sued is not entitled to have that question decided, but that his suit ought to be dismissed at once. In those suits, it is true that the existence of the relationship of landlord and tenant was not disputed, but, in the present case, although the plaintiff does dispute the tenancy, it is clear that his predecessor, the zemindar, through whom he derives title, did admit the tenancy of the defendants, and did receive rent from them, and after him his ijaradar did receive rent from the defendants. Therefore, the party from whom the plaintiff derives his title having admitted the tenancy of the defendants, the plaintiff cannot, simply by reason of his having made a false allegation ignoring altogether the existence of this tenancy, derive any benefit from the decisions which his learned counsel has quoted; for, if that were so, he would be deriving a benefit from his own false statement, a statement which has been found by the Court below to be false, and which has been practically abandoned by the plaintiff's counsel in the course of his argument, namely, that he was in khas possession, and that he was forcibly ejected by the defendants.

We proceed to decide whether the plaintiff in the present suit has proved his right to eject the defendants. We think that he has not done so. The defendants are clearly in occupation of these lands as jotedars since 1264, and it is probable that they held these lands long before 1264; but, be that as it may, we find them recognized by the Government as jotedars in the year 1264, they have paid rent to, and have been recognized as jotedars by, the zemindar through whom the plaintiff derives his title, and they have further been acknowledged as jotedars, and rent has been received from them by the lessee of that zemindar. The zemindar through whom the plaintiff derives title is bound by the terms of the permanent settlement effected with him to respect the rights of these jotedars; and his predecessor, the zemindar, has also by a likhun ratified these jotedaree ri It is true that this "likhun" has not proved, there being no subscribing witne to it, and no witnesses were called to p its execution, but it seems to us to have admitted in the Court below without objection on the part of the plaintiff; even without the support which the cas the defendants obtains from this "likh there is sufficient evidence on the recor show that the zemindar did recognize defendants as jotedars of the mehal, and receive rent from them. This being case, the plaintiff is not entitled to deter the tenancy of the defendants who hol jotedars since 1264, without proceeding legal manner to determine that tenancy has no right to treat them, as he has don this case, as trespassers, and to sue for d possession.

We think, therefore, that the suit of plaintiff has been properly dismissed by Court below, and we dismiss the appeal all costs payable by the appellant.

The 5th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Mo *Judges.*

Agency—Limitation—Act VIII. (B. C.) of s. 30.

Case No. 706 of 1873.

Special Appeal from a decision passed the First Subordinate Judge of Bhaug pore, dated the 31st December 18 reversing a decision of the Officiat Additional Moonsiff of Begoosurai, d the 3rd September 1872.

Ram Bhurosee Chowdhry (Defendant), *Appellant,*

versus

Hunooman Singh and others (Plaintiffs), *Respondents.*

Baboo Boodh Sen Singh for Appellant.

Baboo Nil Madhub Sen for Respondents.

There is no limitation but that which is prescri in Act VIII. (B.C.) of 1869, s. 30, to the brin of a suit against an agent with regard to zemindar matters (*e.g.*, tehsildar and collector of rents), for t recovery of money or the delivery of accounts an papers.

Phear, J.—It appears to us that the Subordinate Judge has not correctly dea

h the question of limitation, and has in sequence been misled upon the merits of r case. In our opinion there is no itation to the bringing of this suit epting that which is prescribed by the h section of Act VIII. (B.C.) of 1869, ich says that "suits for the recovery of oney in the hands of an agent, or for the livery of accounts or papers by an agent, ay be brought at any time during the ency or within one year after the termination of the agency of such gent....."

The agency here spoken of is agency with rd to zemindaree matters; and the endant is sued by the plaintiff as having n his tehsildar and collector of the rents ertain mouzahs. He is therefore an nt within the meaning of this section. vided the suit be brought within the year lowing upon the determination of the ncy, the plaintiff may recover from the nt all money belonging to him, which, he show, came into the hands of the agent the matter of the agency. There is no ther limitation of three years as the Subornate Judge seems to think there is.

We cannot gather from the judgment of e Subordinate Judge that he has found as act the exact day upon which the agency the defendant terminated. And as he s bound by the pleading of the defendant determine that as a preliminary issue, this e must go back even upon that ground one.

But, as has been already said, the mistake ich the Subordinate Judge has made with gard to the limitation, has led him to nsider that the plaintiff could only seek to cover such moneys as he could show came the hands of the defendant within the ree years immediately preceding the date the institution of the suit.

In our judgment, however, if the finding the Subordinate Judge with regard to the rmination of the agency is such that the it is not barred, the plaintiff is entitled to ecover all the moneys which, he can show, ame into the hands of the agent at any ime.

The Subordinate Judge must be careful to nsider the evidence bearing upon this int, because the case of the defendant is at he was not tehsildar at any time, and erefore he makes no admission whatever as aving received money during the period ith which he is charged by the plaintiff. e plaintiff's case, therefore, must be made out entirely upon the strength of his own evidence.

We therefore reverse the decision of the Lower Appellate Court, and remand the case for re-trial.

The costs of this Court will abide the event.

The 6th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Execution-proceedings—Wassilat—Onus Probandi.

Case No. 230 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Purneah, dated the 19th April 1873, modifying a decision of the Additional Moonsiff of that District, dated the 15th June 1872.

Amjatt Ali and another (Judgment-debtors), *Appellants,*

versus

Azhur Ali and another (Decree-holders), *Respondents.*

Baboo Rajendro Nath Bose for Appellants.

Baboo Grish Chunder Ghose for Respondents.

Where a judgment-creditor admits having obtained possession of a portion of the land without opposition from the judgment-debtor, the onus lies on him to show that he was unable, nevertheless, to obtain possession of the remainder.

Phear, J.—The Lower Appellate Court has animadverted somewhat forcibly upon the manner in which the case has been tried by the Moonsiff, and the consequent obscurity in which the state of facts between the parties was involved. We wish very much that the Judge could have in some degree lessened this obscurity; for the case appears as difficult to understand upon the judgment of the Lower Appellate Court as upon that of the Moonsiff. This much, however, is clear that, inasmuch as the decree-holder applied for assessment of wassilat after decree by way of execution-proceedings, it was incumbent upon him as a first step to show how long he was kept out of possession by the judgment-debtor, for we need hardly say that the judgment-creditor is only entitled to recover wassilat from the judgment-debtor for such time as he was deprived of possession of the land by the action or conduct of the judg-

ment-debtor. Now, in the present case, it appears that the decree for possession and for assessment of wassilat was made in 1864, and the judgment-creditor succeeded in obtaining possession of a part at least of the land almost immediately after the decree, without having any need of recourse to the process of the Court. The land consists partly of neejabadee land, and partly of land occupied by ryots. The judgment-creditor obtained in 1864 possession certainly of the neejabadee land by consent of, or without any opposition from, the judgment-debtor, and the inference from this fact, if any, would seem to be that he might have obtained possession of the remaining land if he had so chosen, without opposition on the part of the judgment-debtor. There is no reason suggested why he was in a different situation in this respect as regards the one portion of the land and as regards the other portion of the land. The judgment-creditor, therefore, was bound before he could succeed in obtaining wassilat for any period after 1272 to satisfy the Court that the judgment-debtor did in fact keep him out of possession of the land, notwithstanding the decree in his favour after that time.

The Judge seems to have been of opinion that it lay upon the judgment-debtor to show distinctly that he had put the judgment-creditor in possession. We think that this is not so on the facts which have been found by the Judge; that the onus does in this case lie upon the judgment-creditor, after having admitted that he obtained possession of a portion of the land without opposition from the judgment-debtor, to show that he was unable, nevertheless, to obtain possession of the remainder. The Judge has not tried the case in this light; and we think, therefore, that it must go back to him for that purpose.

Accordingly, we reverse the order of the Judge, and remand the case for re-trial.

We will add that we have very lately, in a somewhat similar case, had occasion to remark that it is the duty of the Court in proceedings for the purpose of assessing wassilat during the pendency of the application for execution to take care that these proceedings are carried on diligently, and are not without good cause protracted.* It is here entirely unexplained why the application for the assessment of wassilat, which was made so far back as the 31st March 1865, has not been carried to a final conclusion before the year 1872. Of course, if there was any *bond-fide* obstacle in the way of the ju ment-creditor which he could not reasou overcome, he ought to have full considera given him. Otherwise he ought to be h by the Court, like any other suitor, boun prosecute his suit for wassilat with diligence and without delay. If he fail do so, it is the duty of the Court to put end to the proceedings once for all.

The costs will abide the event.

* *Ante*, p. 213.

The 6th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Mo *Judges.*

Service of Process—Act VIII. of 1859, s. Procedure.

Case No. 309 of 1873.

Miscellaneous Appeal from an or passed by the Officiating Additio Judge of Tirhoot, dated the 1 August 1873.

Khudeerun Lall (Judgment-debtor), *Appellant,*

versus

Chutterdharee Lall (Decree-holder), *Respondent.*

Baboo Taruck Nath Paulit for Appellan

Mr. R. T. Allan for Respondent.

Under Act VIII. of 1859, s. 55, there is no pro service unless the defendant is actually dwelling in house upon which the summons is fixed, and cann after diligent search, be found.

Where a judgment-debtor applies to set aside *ex-parte* judgment on the ground that there was effectual service of the summons upon him, he sho be called upon to give his evidence, or to make out *primâ-facie* case.

Phear, J.—We think that there has be no trial of the matter of the judgme debtor's application in this case. T Judge says: "After recording eviden "touching the service of the notice, I a "satisfied that the matter was properly co "ducted, and the applicant's non-a "pearance was entirely his own fault, an "that the delay gained thereby was pu "posely brought about to postpone the pa "ment of a just debt. The service of th "summons being proved to my satisfactio "I decline to set aside my judgment of th "above date."

But the depositions of only two witnesse are to be found upon the record, namel Bunwaree Lall and Bullee Dhanook. An

ainly the testimony of these witnesses only does not afford evidence of service, goes a long way to show that there was effectual service.

We need hardly remark that in all cases ice of summons upon a defendant uld, if possible, be personal. There is a cific enactment in the Civil Procedure le to that effect. Then section 55, Act I. of 1859, says that, "when the fendant cannot be found, and there is no gent empowered to accept the service, nor y other person on whom the service can e made, the serving officer shall fix the py of the summons on the outer door of e house in which the defendant is dwell-g; and, if he is not dwelling in the place entioned in the summons, the serving ficer shall return the summons."

Under that section there is no proper vice unless it be the fact that the defend-t is actually dwelling in the house upon ich the summons is fixed, and cannot, after igent search, be found; in other words, is eping out of the way to avoid service.

Now Bunwaree Lall and the other witness not even pretend to say that they were esent at the time when the notice was ed on the dwelling-house of the defendant. hey were not in a position to say whether y attempts were made to find him or not. or does either of them say that to his owledge the defendant was dwelling in t house at that time and on that very day. The account of the defendant is that he as not dwelling there at that time; that he as elsewhere upon duty. Therefore the rdinal point to be determined in this case whether or not the defendant was actually welling in the house at the time when the mmons was fixed upon it.

There is another point to be determined: Whether or not, if he was dwelling there, he ould be found by reasonable efforts made r that purpose.

Neither of these witnesses speak to either e one or the other of these points. In ct they speak but second-hand altogether: hey only say that, subsequently to the notice eing fixed, they saw it hanging on the ouse. The peon who was charged with e duty of effecting the service, and the an who went with the peon to point out e house, and who, therefore, was possessed ith the knowledge, or ought to have been ossessed with the requisite knowledge as to hether it was the house in which the efendant was then dwelling, are neither of m examined.

Further than this, there is enough in the evidence of one of the witnesses to suggest at any rate the probability that the defendant was elsewhere at the time.

On the whole, this evidence, as we have already said, falls very far short indeed of proving service; it rather indicates that there was no proper service of summons.

On the other hand, it was incumbent upon the judgment-debtor, in an application of this kind, to make out his own case. He has not been examined; and if we thought that this omission was attributable to his own fault, *i. e.*, that he intentionally withheld himself from being examined, we should be able, even on this record, to decide this case finally. But it appears to us from the judgment of the lower Court that the petitioner was not in fact called upon to give his evidence, or to make out a *primâ-facie* case. The Court seems to have been satisfied with his petition, and upon that ground alone proceeded to inquire into the merits of the case of the other side. This we think is wrong. In truth there has been no proper trial of the matter brought before the Court upon the application of the judgment-debtor, and therefore the decision of the Judge must be reversed, and the case remanded for re-hearing,

The costs will abide the event.

The 6th February 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution—Limitation—Special Appeal.

Case No. 279 of 1873.

Miscellaneous Appeal from an order passed by the Additional Subordinate Judge of Mymensingh, dated the 26th May 1873, affirming an order of the Sudder Moonsiff of that District, dated the 27th June 1872.

Bhoobunessuree Debia (Judgment-debtor), *Appellant,*

versus

Chunder Monee Debia and others (Decree-holders), *Respondents.*

Baboo Protab Chunder Mojoomdar for Appellant.

No one for Respondents.

Certain sharers in a decree, of which execution was sought, were allowed to count the time of pendency of

a special appeal made by their co-respondents, in which they did not appear, but of which the grounds were common to all the respondents.

Glover, J.—We think that the respondents are entitled to get their costs. The decree of the High Court is dated the 25th of May 1869, and execution was sought by them of the original decree within three years from that date. It is said that as these two respondents did not appear in the special-appeal stage, they are not entitled to count the time during which the special appeal was pending before the High Court; but, although they did not appear, no less than six of their co-respondents did appear in special appeal, and the grounds of appeal which they took were grounds common to all the respondents. We think, therefore, that these two respondents were entitled to count the time during which the appeal of their co-respondents was pending, and to recover their costs of the first and second Courts for which they now want to take out execution. The appeal will be dismissed, but without costs, as no one appears for the respondents.

The 6th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Execution—Bona fides.

Case No. 237 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 28th April 1873, reversing an order of the Sudder Moonsiff of Chuprah, dated the 15th September 1872.

Hur Sahoy Singh and others (Decree-holders), *Appellants,*

versus

Gobind Sahoy and another (Judgment-debtors), *Respondents.*

Baboo Bama Churn Banerjee for Appellants.

Moonshee Mahomed Yusuf for Respondents.

The filing of a petition for execution, if done *bonâ fide* with the intention of keeping a decree alive, which the judgment-creditor had no opportunity of enforcing, would save the decree within the words of Act XIV. of 1859, s. 20.

An Appellate Court ought not to conclude against the *bona fides* of such applications if they were not objected to in the first Court, and the judgment-creditor had no opportunity of explaining them.

Phear, J.—We think that the judgment the Lower Appellate Court is bad on the f of it. The Judge says: "The decree "passed on the 27th March 1867; execut "was issued on the 9th September, and ag "on the 31st December 1869, and again "the 22nd September 1870, and again "the 22nd March 1872, but no steps we "taken to keep the decree alive; and it "therefore barred by limitation."

Now it can only be barred, if at all, by t operation of section 20, Act XIV. of 18 which says: "No process of execution sh issue from any Court not established Royal Charter to enforce any judgme decree, or order of such Court, unless so proceeding shall have been taken to enfo such judgment, decree, or order, or to ke the same in force within three ye next preceding the application for su execution."

If execution was issued as the Judge s it was, on the several occasions mentio by him, then obviously proceedings to enfor the judgment were taken at intervals ea less than three years; and there was scope for the operation of this section.

We are told, however, that the Judge wrong in saying that execution issue because, in fact on each of these occasions, other step was taken by the judgment-credi tor, or indeed by the Court, than the filing a petition for execution by the judgmen creditor. But even the filing of a petitio for execution, if it was done *bonâ fide* wit the intention of keeping a decree alive, whic the judgment-creditor had no opportunity enforcing, would save the decree within th words of section 20. So that the judgmen creditor in this case ought not, at all event to be barred from his execution before h had an opportunity of showing whether o not his applications for execution wer severally made *bonâ fide* with the desire an intention of obtaining execution of hi decree if he could, or, if he could not, to keep it alive. It does not appear that the Lower Appellate Court directed its attention at all to this point; it nevertheless was bound t do so, because it has been shown to us tha one of the objections in the appeal to tha Court was that the application for execution was barred by lapse of time.

We are, therefore, of opinion that the order of the Lower Appellate Court must be reversed, and the case remanded to that Court for re-trial.

We may add that the Judge ought not to come to any conclusion on these application

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er than that they were *bond fide* if it ears that the objection was not made in first Court, and the judgment-creditor efore had not been afforded an opportity for explaining them.

The costs will abide the event.

The 9th February 1874.

Present:

e Hon'ble Sir Richard Couch, *Kt.*, *Chief ustice*, and the Hon'ble F. A. Glover, *udge*.

rent—Limitation—Act XIV. of 1859, s. 9.

Case No. 1872 of 1873.

cial Appeal from a decision passed by e Officiating Judge of Moorshedabad, ated the 30th July 1873, affirming a cision of the Subordinate Judge of at District, dated the 16th January 873.

Hossein Buksh (Defendant), *Appellant*,

versus

Syud Tussuduck Hossein (Plaintiff), *Respondent.*

Baboo Sreenath Doss for Appellant.

oo Mohinee Mohun Roy for Respondents.

suit against an agent to recover money received by and concealed from the plaintiff falls within Act . of 1859, s. 9.

Couch, C.J.—THE defendant was employed the plaintiff as his agent to receive the ney, and thus had such a fiduciary relation the plaintiff as made it a fraud, after the endant had received the money, to conceal om the plaintiff.

We think this is a case which comes within tion 9, Act XIV. of 1859. It would be ange if a law of limitation allowed an nt to receive money for his principal, d by concealing it for three years, to come able to keep it for himself. The conction we put upon the section applies this case, and we think that the lower rts were right in the conclusion they e come to.

The appeal must be dismissed with costs.

The 9th February 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice.*

Court Fees Act—Probate Duty.

Case referred to the Honorable the Chief Justice by Mr. Robert Belchambers, Taxing Officer of the High Court, under section 5 of the Court Fees Act, 1870.

In the Goods of Julia Oram, *deceased.*

There is no provision in the Court Fees Act for the levy of an *ad-valorem* fee on personal property appointed by will under general powers of appointment.

Case.—IT appears that, under the will of General Stephen Davis Riley (which was proved in this Court on the 5th of July 1867), Julia Oram, lately deceased, had a life-interest in Rs. 10,000, with a *general and absolute* power of appointment over that sum. This power of appointment she has exercised by her will, of which the Administrator-General, as *ex-officio* executor, has now applied for probate. And, on the authority of Platt *vs.* Routh, 6 M. & W. 756 (which was affirmed by the House of Lords —Drake *vs.* The Attorney-General, 10 Clarke and Finelly 237), it is claimed on behalf of the Administrator-General that no probate-duty is payable on the Rs. 10,000.

The case cited was a decision on 55 Geo. III., c. 184, s. 38, the words of which ("the estate and effects of the deceased for, or in respect of, which the probate or letters of administration is or are to be granted") are similar to the words of the Court Fees Act, 1870, Schedule I, clause 11: ("Two per centum on the amount or value of the property in respect of which the probate or letters or certificate shall be granted.") In that case the power of appointment was treated as general and absolute, and the property appointed was treated as belonging to the estate of the person by whom the power of appointment was created, and not to the estate of the person making the appointment.

There is no distinction between that case and the present one, except that in that case probate-duty had been paid on the property appointed when probate was obtained of the will which created the power of appointment, whereas in the present case no probate-duty has been paid on the Rs. 10,000; the will of General Riley, which created the power of appointment over that sum, having been

proved when only a fixed fee of Rs. 10 was payable under the Succession Act, and before any *ad-valorem* fee was required to be paid.

It has been held that the payment of the fee of Rs. 10 is not equivalent to the payment of the *ad-valorem* fee. In the Goods of W. G. Chalmers,* 6 Bengal Law Reports, App., 137.

This, however, cannot affect the question to be determined, namely, whether the estate of Julia Oram is liable to the payment of the *ad-valorem* fee on the Rs. 10,000.

By 23 and 24 Vict., c. 15 (passed since the decision in Drake *vs.* The Attorney-General), it is provided (section 4) that probate-duty shall be levied and paid on personal property appointed by will under general powers, and (section 5) that the same shall be a charge or burden upon such property.

There is no similar provision in this country.

Opinion of the Chief Justice:—

I think the *ad-valorem* fee is not payable. If the words in the schedule were construed so as to make it payable, the serious difficulties referred to by the Court of Exchequer in Platt *vs.* Routh would arise. There is no provision in the Court Fees Act to make the *ad-valorem* fee a charge upon the Rs. 10,0

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* The 11th July 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice.*

In the Goods of W. G. Chalmers.

Case referred to the Hon'ble the Chief Justice, under section 5 of the Court Fees Act VII. of 1870, by Mr. R. Belchambers, Taxing Officer of the Court.

Case.—On the 25th of February 1869, the Administrator-General obtained letters of administration of the property and credits of the above-named deceased, limited until the paper-writing purporting to be his last will and testament should be proved.

A fixed duty of Rs. 10 prescribed by the Schedule to the Indian Succession Act, 1865, was paid in respect of such limited letters of administration.

The Administrator-General having now proved the will, and obtained an order for general letters of administration, with will annexed, in lieu of the former limited letters of administration, which by the same order are directed to be cancelled, the question arises whether any and what fee is payable in respect of the general letters of administration now obtained.

It was submitted on behalf of the Administrator-General that, as the duty of Rs. 10 was the full duty payable by the law then in force, the subsequent alteration of the law by Act VII. of 1870, the Court Fees Act, should not be allowed to effect the amount of the duty; in other words, that the payment of the full duty of Rs. 10 under the Succession Act should be taken as equivalent to the payment of the full *ad-valorem* duty prescribed by the Court Fees Act.

Opinion of the Chief Justice:—

The fee of two per cent. must be paid on the amount of the property in respect of which the letters of administration are to be granted, irrespective of the Rs. 10 paid on the former letters of administration. The petition should state the amount of the property, and the Taxing Officer will compute the fee on the amount stated.

The 9th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Mo
Judges.

Mesne-profits—Damages.

Case No. 8 of 1873.

Special Appeal from a decision passed the Second Subordinate Judge of B gulpore, dated the 19th September 18 affirming a decision of the Moonsif that District, dated the 29th April 187

Ghoogly Sahoo and another (Plaintiffs) *Appellants,*

versus

Chundee Pershad Misser and another (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellants.

Baboo Lukhee Churn Bose for Respondents.

A party who has been active in wrongfully keeping another out of the possession and enjoyment of property is liable for consequential damages, whether he derived any profit himself from the possession of the land or not.

Phear, J.—We think that the Subordinate Judge has taken a wrong view in this case of the nature of the plaintiff's cause of action. He appears to have thought that wassilat or mesne-profits could only be claimed by the plaintiff from the person who had been in the possession of the land and of the actual enjoyment of the rents and profits of the land. But it has often been explained by this Court in decisions which are reported that a suit for wassilat is essentially a suit for damages—damages no doubt of a peculiar kind—the measure of which is taken to be the profits which the plaintiff would have derived from the possession of the land, if he had not been wrongfully kept out of the possession by the person from whom he claims the damages. It is not necessary, in order to entitle him to a decree for damages for mesne-profits against the defendant whom he sues, to show that the defendant himself had enjoyed the mesne-profits instead of the plaintiff. It is enough to show that he was active in keeping the plaintiff out of the

ession and enjoyment of the property. s has done so, and done so wrongfully, he ound to pay to the plaintiff consequential ages, whether he derived any profit self from the possession of the land or

low, in the present case, it appears to be r from the facts which the Subordinate ge himself has found or referred to as s in the case that Chundee Pershad Misser k an active part conjointly with Parbutty teeping the plaintiff out of possession of land during the two years for which the ne-profits are sought. And this being it seems clear that the decree of the nsiff, which made him responsible with butty for mesne-profits, was a right see; and the decree of the Lower Appel- Court reversing this was wrong. We refore reverse the decision of the Lower ellate Court, and affirm that of the nsiff, with costs in this Court and in the rt below.

The 9th February 1874.

Present:

e Hon'ble J. B. Phear and G. G. Morris, *Judges.*

hal Contract—Cause of Action—Limitation.

Case No. 622 of 1873.

ecial Appeal from a decision passed by the Officiating Subordinate Judge of Sarun, dated the 20th December 1872, reversing a decision of the Moonsiff of Sewan, dated the 14th June 1871.

am Dehul Misser (Defendant), *Appellant,*

versus

Tekudhur Misser and others (Plaintiffs), *Respondents.*

Mr. M. L. Sandel for Appellant.

Mr. R. T. Allan for Respondents.

Where plaintiff had voluntarily joined with defendant mortgaging his share of joint property to a third y (M) under an arrangement by which defendant dertook to pay him a certain sum at the expiration of usufructuary lease which they jointly granted to M: LD that plaintiff's right to recover accrued at the ation of the lease, and that he had three years from date to bring his suit, because the contract was a d one.

Phear, J.—In this case we think that the ordinate Judge has taken an erroneous view of the nature of the cause of action. It seems to us that the plaintiff's right of suit, if he has any, does not arise out of any *quasi* contract, or out of any circumstances which would give rise to any equity in his favour as distinguished from legal right.

The Moonsiff was of opinion that, according to the terms of the plaint, the matter in issue between the parties was one of contract only. And we think that this view is right. The plaintiff joined with the defendant in mortgaging his share of the property to Mr. Macleod. This act was a voluntary act on his part, dictated, no doubt, by consideration of expediency with which we have no concern. But it was not done by him under any external compulsion, such as happens in a case to which the rule with regard to contribution applies. If one person, in order to save property to which he is entitled jointly with others, is obliged by an external force to pay money in respect of the joint property, a portion of which ought, at the time when he paid it, to have been paid or borne by the other proprietor, then on facts of this kind it may often be that he has a right to recover from the co-proprietor a proportionate share of the money which he has disbursed. But nothing of the kind occurred here. The mortgaging of the joint property was simply a matter of arrangement between the plaintiff and the defendant themselves; and the right to recover the money which is claimed in the present suit, if it exists at all, must depend upon what the terms of that arrangement were. The plaintiff says distinctly that there was an arrangement between him and the defendant in this respect; and he states expressly that the defendant undertook to pay him the sum which he now claims at the expiration of the usufructuary lease which they jointly granted to Mr. Macleod.

If this be so, and this is the plaintiff's own account of the transaction, by which he must stand or fall, then his right to recover the money for which he sues accrued to him on the expiration of the lease. And he had from that time forward only three years within which to bring his suit, because he states the contract was a verbal contract.

It seems to us, therefore, very plain that this suit is barred by the operation of the Act of Limitation. Accordingly we reverse the decision of the Lower Appellate Court, and affirm that of the Moonsiff.

The defendant must have his costs both in this Court and in the Court below.

The 10th February 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Arbitration-award—Act VIII. of 1859, ss. 325 & 327.

Case No. 1763 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 19th May 1873, affirming a decision of the Moonsiff of Amtah, dated the 16th September 1872.

Sreenath Chatterjee (one of the Defendants), *Appellant,*

versus

Kylash Chunder Chatterjee (Plaintiff), *Respondent.*

Baboo Romesh Chunder Bose for Appellant.

Baboo Gopal Lall Mitter for Respondent.

Section 327, Civil Procedure Code, incorporates the provision in s. 325 as to the finality of the judgment given according to the award, and puts the award filed under s. 327 in the same position as the award filed under s. 325. Where a Court files an arbitration-award, and passes a decree, that decree is final.

Ob. dic.—The word "date" in s. 327 does not mean the day written in the award, as when it was made; but the time when it is handed over to the parties, so that they may be able to give effect to it.

Couch, C.J.—In this case, there having been a reference to arbitration under the power given by section 326 of Act VIII. of 1859, an application was made to the Moonsiff under section 327, which seems to have been, as required by that section, numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants, and the Moonsiff gave judgment as in a suit. He said that the plaintiff brought the suit on the allegation of the appointment of arbitrators and the award being made, and asked to have the award filed. He considered the objections which were taken before him to the final award, and decided that the objection, that more than six months had elapsed from the date of the award before the application was made to file it, was not valid, and held that it was right that the six months should be calculated from the time when the plaintiff was furnished with the award, and when he was in a position to make an application to file it.

Certainly, as regards the merits of the case, it would be proper to allow the plaintiff six months from the time when the arbitrators furnished him with the award, and he could take steps to have it enforced. It would not be right, when they refused to give the award for more than six months that he should be precluded from enforcing it under section 327. We should think that it were necessary to decide that question that the word "date" does not mean the date written in the award, as when it was made, but the time when it is given to the parties when it becomes an award, and is handed over to them, so that they may be able to give effect to it. But, for the reasons which we shall give, we need not decide this point.

The Moonsiff determined that the award should be filed, and made a decree in accordance with its terms. It is now said that the award is not final, and is therefore not valid. This objection does not appear to have been taken before the Moonsiff. It ought to have been taken before him, for, if there is any ground for it, the proper course would have been to remit it to the arbitrators that they might make a final award. Probably the objection was not taken, because it suited the defendants to take the benefit of part of the award. It would not be equitable to allow them now to say that it is invalid, because it does not decide all the matters in difference when they have taken the benefit of the part of it which is in their favour.

The Moonsiff then having filed the award and passed a decree, that decree is, in our opinion, by the terms of section 327, final. This has been held by five of the learned Judges of this Court, whilst I was absent, in a case which was referred to a Full Bench by myself and Mr. Justice Mitter, four of them being of opinion that an appellant might show that the paper filed was not an award; but all agreeing that, if it is an award, the judgment in accordance with it is final.*

It appears to us that it was the intention of the Legislature to give to an arbitration the effect which it is generally understood it ought to have, and which is mostly the object of an arbitration—to put an end to the dispute between the parties by the decision

* 15 W. R. (F. B.) 9.

ersons chosen by themselves. It would, our opinion, be contrary to the object arbitration to hold that the parties may each the decree which is founded upon award by a regular appeal, and then by pecial appeal to this Court, treating it in same way as if there had been no agree- t to refer to arbitration, and merely put- the award in the place of a decree of a rt of first instance. We regret that, on uestion of this kind, which is a very ortant one of practice, and upon the struction of the Code of Civil Procedure, re should be any conflict between the h Courts in India. But the High Court Bombay appears in the case in 8 bay High Court Reports, A. C. J., e 17, to have come to an opposite decision that of the Full Bench of this Court. ir decision preceded the decision of this rt by some months, but it is to be erved that they refer to only one of the vious decisions of this Court, namely, the e in 12 Weekly Reporter, page 50, and not seem to have known that there were er decisions to the contrary; for instance, judgment of Mr. Justice Phear in 13 ekly Reporter 62, which was quoted to for the appellant.

We must also remark that we doubt, and hope that Court will forgive us for ying so, the soundness of their reasoning. ey say that an order to file an award is tamount to a decree, and is therefore pealable, distinguishing the order to file award from the refusal to file it, which, ey agree, is not appealable as it is not a cree. Thus they treat the filing of the ward as a decree, and therefore appealable, nd do not appear to us to have taken any otice of the words in section 325, which say pressly that the judgment which is given cording to the award, namely, the decree, all be final. Section 327 appears to incor- rate that, for it says that the award may e enforced as an award under the provisions this Chapter—that is, of section 325, and uts, as the learned Judges of this Court ave thought, the award filed under section 27 in the same position as the award filed nder section 325. The learned Judges of he Bombay High Court say that the one is decree just as much as the other, and yet ey say that one is not final and the other . We are unable to see the force of the easoning upon which this decision was ome to, and we agree in the opinion in hich the Judges of this Court were agreed.

The appeal must be dismissed with costs.

The 10th February 1874.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Joint Hindoo Family — Succession—Onus Probandi—Managing Member—Adverse Possession.

Case No. 248 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 22nd June 1872.

Nullit Chunder Gooho (Defendant), *Appellant,*

versus

Bugola Soonduree Dossee (Plaintiff), *Respondent.*

Baboo Ashootosh Dhur for Appellant.

Baboo Sreenath Doss for Respondent.

In a suit by a Hindoo widow for a moiety of ancestral property, &c., where the defendant, who was her husband's uterine brother, urged that the deceased was disqualified from succeeding, inasmuch as he was a leper, *held* that the onus was upon the defendant to prove the alleged disqualification.

The fact of a managing member of a joint undivided Hindoo family paying the rents of the family-property to the superior holder is not inconsistent with his uterine brother's rights; nor does his giving dakhilas for rent indicate possession adverse to his brother's widow.

Kemp, J.—THE defendant Nullit Chunder Gooho is the appellant in this case. The suit was brought *in formâ pauperis* by Bugola Soonduree Dossee, the widow of the late Ishan Chunder Gooho. She sues for a moiety of the immoveable property of the late Kashee Nath Sircar, who is admittedly the maternal grandfather of Ishan Chunder Gooho, the husband of the plaintiff, and of the defendant Nullit Chunder Gooho. She also sues for her share of the moveable property and for mesne-profits from the date of dispossession, which she alleges took place in 1274. Kashee Nath Sircar, who died in Assar 1254, left a widow, Doya Moyee, who died in Pous 1254, and a daughter, Nubo Doorga, who was married to Raj Chunder Gooho. Nubo Doorga left two sons, Ishan Chunder, the husband of the plaintiff, and Nullit Chunder, the defendant. It is admitted by both parties that Raj Chunder Gooho died in 1273.

The defendant, in his written statement, stated that the plaintiff's husband died in Bysack 1263, and not in Bysack 1269, as alleged by the plaintiff; that her suit was therefore barred by limitation, and that, with-

the view of curing this defect, the plaintiff had falsely alleged that her husband died in 1269; and that she lived in commensality with the defendant, and was in joint possession of the disputed property until Magh 1274, when ousted by the defendant.

Then an objection is taken in the 3rd paragraph of the written statement as to the personal property. Here we may observe that the Subordinate Judge has dismissed the plaintiff's suit with reference to the moveable property, and there is no cross-appeal on that point. Then it is said that Ishan Chunder, the brother of the defendant Nullit Chunder, was disqualified, inasmuch as he was a leper, and could not, under the Hindoo Law, succeed to the property. Then it is said that the plaintiff became unchaste during the lifetime of Ishan Chunder; that Ishan Chunder discarded her, and did not associate with her up to the time of his death; and that this suit has been brought by the plaintiff in collusion with Kristo Mohun Shah, a naib of the house, against whom the defendant had brought a suit for misappropriation of cash-balances and for accounts.

The Subordinate Judge found on the evidence that Ishan Chunder died in Bysack 1269, and not in Bysack 1263, and that the suit of the plaintiff having been instituted in 1277 is well within time. With reference to the question as to whether Ishan Chunder was disqualified on account of his being a leper, the Subordinate Judge found that the evidence, that he was a leper, is not satisfactory, and he does not believe it. Then, with reference to the chastity of the plaintiff, the Subordinate Judge does not believe the evidence which has been adduced to prove that allegation by the defendant. With reference to the documents filed by the defendant, the Subordinate Judge observes that these dakhilas and other documents are not inconsistent with the fact that Nullit Chunder, after the death of Ishan Chunder, and even before his death, was the managing member of the family, Ishan Chunder being in delicate health; and there is nothing inconsistent with the plaintiff's rights in the fact of the rents having been paid to the superior holder by Nullit Chunder, as the status of the family was that of a joint undivided Hindoo family. With reference to the wassilat, which has been claimed by the plaintiff from the date on which she was driven out of the house by her brother-in-law to date of suit, namely, from Magh 1274 to Srabun 1277, the Subordinate Judge finds that there is conflicting evidence on question, the witnesses for the plaintiff ha stated that the gross collections from estate were much larger than what witnesses for the defendant deposed to. the whole, he has assumed that the income of the estate was no less than fo five hundred rupees, and he has given plaintiff wassilat from 1274 to the 23r Srabun 1277, at the rate of Rs. 400 annum, and also costs with interest the at the rate of 6 per cent. per annum; mesne-profits to bear interest at the same up to date of realization.

Now, with respect to the alleged disq fication of Ishan Chunder, which is course, the most important point in the c we find that it is admitted that Ishan Chu and Nullit Chunder Gooho were ute brothers, and that, according to the ordi rules of inheritance under the Hindoo L Ishan Chunder would be entitled to 8 a and Nullit Chunder to 8 annas of the e of Kashee Nath Sircar. Therefore the o was clearly on the defendant to prove Ishan Chunder was disqualified, owing t being a leper. The most important witne who have been examined by the defen on commission, namely, the relatives of parties, do not give any evidence as Ishan Chunder being a leper, nor doe appear that the defendant even ventured put them any question on that point. therefore, on this part of the case, enti concur with the Subordinate Judge in hold that there is no satisfactory evidence Ishan Chunder was disqualified.

Then, with reference to the plaintiff be unchaste, a good deal of evidence has b given on both sides on this point. witnesses who have been examined by defendant, who are relatives of both part do not give any precise evidence on point, and in some respects their evidence contradictory of evidence which has b given by the other witnesses, such as barber, the washerman, and other witne examined by the defendant. The relati who have been examined in 1279, say t plaintiff left her husband's house—some say some 8, some 9, some 10, and some 11 ye ago; they none of them say that she left t house more than 11 years ago. Now it very clear that, if the statement of the defe ant is correct that Ishan died in 1263, t lady must have been living in the fami house for some 6 years after, according the defendant's own case, she was uncha and that she must have been unchaste, if t

tiff's case is correct that Ishan died in , in the lifetime of her husband. But, se witness-relatives are to be believed the year in which the plaintiff left her and's house, then the statement of the tiff, that her husband died in 1269, would tirely consistent with what the relative- sses have stated as to the year in which laintiff left her huband's house. There o, we may observe, with reference to evidence given by the relatives, the fact hey seem to form their opinion as to the stity of the plaintiff, not from any per- l knowledge, for they say that her cter was in their estimation bad, because has left her husband's house. Now the tiff has given a very good reason for g left her huband's family-house, and tatement is borne out by the witnesses n she has examined.

e defendant, in support of his plea that possession has been adverse as against plaintiff, as also against her husband n Chunder before her, has filed certain ilas. None of these dakhilas date er back than the year 1265. After the h of Ishan Chunder, Nullit Chunder, as surviving male member of the family, managing the joint property for himself the widow of Ishan Chunder. The ilas upon which great stress has been are no proof of the title being in Nullit nder alone; they only show that the ndar was receiving the rent through agency of Nullit Chunder. Therefore, eing, as we do, with the Subordinate ge in holding that Ishan Chunder Gooho in 1269, and this suit being brought 277, we do not find that it is barred by Statute of Limitation, nor do we find the possession of Nullit Chunder was erse to the widow.

ith reference to the wassilat, we think it might well have been awarded up to date on which the plaintiff shall regain ession of her moiety of the estate, but, as has not asked in this case for wassilat ond the date of suit, we cannot award it. think it clear from the judgment of the ordinate Judge that he intended to award ilat for a moiety of Rs. 400, that sum g, in his opinion, the sum which, the evi- ce shows, was collected from the estate by ir Chunder.

e therefore confirm the decision of the dinate Judge with this exception that wassilat will be calculated from Magh 1274 up to the date of the suit in Srabun 1277 at the rate of Rs. 200 per annum.

The appeal is dismissed with costs.

The 21st November 1873.

Present:

The Hon'ble Dwarkanath Mitter, *Judge.*

Act VIII. (B.C.) of 1869, s. 27—Act X. of 1859, s. 23, cl. 6.

Case No. 1393 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 25th March 1873, affirming a decision of the Additional Sudder Moonsiff of that District, dated the 18th September 1872.

Brojo Kishore Rukbit and another (two of the Defendants), *Appellants,*

versus

Bashi Mundul (Plaintiff), *Respondent.*

Baboo Kashee Kant Sen for Appellants.

Moonshee Serajul Islam for Respondent.

The provisions of Act VIII. (B.C.) of 1869, s. 27, do not deprive the Civil Court of its jurisdiction to entertain suits instituted by tenants to recover possession of their tenures on proof of title.

Mitter, J.—The main ground urged in this case is that the lower Court ought to have dismissed the plaintiff's suit under the provisions of section 27, Act VIII. (B.C.) of 1869, which declare that all suits to "recover the occupancy of any land, farm, "or tenure from which a ryot, farmer, or "tenant has been illegally ejected by the "person entitled to receive rent for the same, "shall be commenced within the period of "one year from the date of the accruing of "the cause of action, and not afterwards."

This objection seems to me to fall within the purview of the Full Bench decision reported in page 186 of Weekly Reporter, Volume VII. In that case it was held that suits brought under clause 6, section 23, Act X. of 1859, are suits of a mere possessory character, and that those provisions do not deprive the Civil Court of its jurisdiction to entertain suits instituted by the tenants to recover possession of their tenures on proof of title. This was a suit in which the plaintiff asked the Court to restore him to possession of the land, from which he had been unjustly ousted by his landlord, on proof

of his howladaree right. It is true that the Full Bench decision refers to clause 6, section 23, Act X. of 1859, but the class of suits mentioned in section 27, Act VIII. of 1869, to which the pleader for the special appellant refers, appears to me to be exactly the same, the language of both the sections, so far as the nature of those suits is concerned, being precisely the same.

The other grounds relate to findings upon the evidence. The Judge has clearly found that the land in dispute was the plaintiff's howladaree land, and that the defendants had unjustly dispossessed the plaintiff from that land as alleged by him in his plaint.

The appeal is dismissed with costs.

The 19th December 1873.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Putnee Talook—Informal Sale—Regulation VIII. of 1819—Refund of Purchase-money.

Cases Nos. 318 and 384 of 1873.

Special Appeals from a decision passed by the Judge of Chittagong, dated the 10th July 1872, affirming a decision of the Moonsiff of Futtickcherry, dated the 29th February 1872.

Mobaruck Ali and others (Defendants), *Appellants,*

versus

Ameer Ali and another (Plaintiffs), *Respondents.*

Baboos Grish Chunder Ghose and *Rajendro Nath Bose* for Appellants.

Baboo Hem Chunder Banerjee for Respondents.

If a putnee is sold for arrears of rent without the notice required by Regulation VIII. of 1819, the sale is informal, and can be set aside notwithstanding the *bona fides* of the purchaser.

Where such a sale was so set aside, and the Lower Appellate Court refused to make an order for refund of the purchase-money, the High Court, in special appeal, and with reference to s. 14, cl. 1 of the Regulation VIII., declared the purchaser entitled to a refund with interest.

Glover, J.—THIS was a suit to set aside the sale of a putnee made under Regulation VIII. of 1819, on the ground that the sale was made without the notice required by the Regulation, and that as a matter of fact there was no arrear of rent due at the time of such sale, the money having been paid in to zemindar's mookhtear before the sale place.

The defence was that the notice had duly published, and that no payment o rent due had been made. The Moonsiff that the alleged payment was not proved he considered that the notice was infor and on that ground set aside the sale. second Court upheld that decision, but went further than the Moonsiff, holding the payment of rent had been proved.

Two special appeals have been prefe to this Court, one by the purchaser, and other by the zemindar who brought putnee to sale.

On the part of the purchaser it is conte that being a *bond-fide* purchaser money, he cannot be affected by any conduct on the part of the zemindar. *bona fides* of the purchaser we think doubtful. It is tolerably clear that purchaser and the zemindar are the s person, but, however that may be, i evident that, before a putnee can be pu for sale under Regulation VIII. of 1819, t must be an arrear of rent due, and it been found on the evidence by the Ju that there was no such arrear due by putneedar; but, even were it otherwise, had the Judge agreed with the Moonsi far as to hold that the payment was proved, there would still have been the o objection to get over, namely, that no n had been served; for, if no notice was ser the sale was informal, and, if informal, it co undoubtedly be set aside, the *bona fides* o purchaser notwithstanding. Both Co have found that the notice was not served, that the sale therefore was a bad sale. Th a finding of fact on the evidence with w we cannot interfere.

Then the zemindar contends that e supposing that the putneedar did pay arrear due before the date of the sale, payment was made to a mookhtear who no authority to receive the money. It sufficient to say that the Judge has found fact on the evidence that the mookhtear authority to receive the money, and disposes of the second special appeal.

There is one point, however, on which Judge's decision ought to be supplemen He has refused to make any order reg the refund of the purchase-money, and done so on the ground that the purch should have applied for such refund to Moonsiff by a petition for review of j ment. That remedy is now shut out; a

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w can be entertained after a special l has been preferred, and therefore, if decline to interfere, the purchaser will liged to bring a regular suit. Under n 14, Regulation VIII. of 1819, clause provided that, in cases like the present, ourt making a decree setting aside the hall be empowered to indemnify the aser against all loss at the charge of the dar or person at whose suit the sale ave been made; and we think that the aser, special appellant in appeal No. 318, led to receive back from the zemindar, brought the putnee improperly to sale, mount of the purchase-money with st at 6 per cent. per annum from the f the sale up to date of re-payment. ther respects these appeals will be ssed with costs.

The 22nd December 1873.

Present:

Hon'ble W. Markby and E. G. Birch, *Judges.*

rt of Wards—Minor—Admission—Shareholder—Separation of Shares.

Case No. 107 of 1873.

l *Appeal from a decision passed by Judge of Beerbhoom, dated the 30th ember 1872, affirming a decision of Subordinate Judge of that District, d the 28th December 1871.*

m Runjun Chuckerbutty (Plaintiff), *Appellant,*

versus

anee Madhub Mookerjee and others (Defendants), *Respondents.*

Mohinee Mohun Roy for Appellant.

Mohendro Lall Mitter and *Umbika Churn Banerjee* for Respondents.

re the Court of Wards, in order to save a minor's from sale, pays on his behalf, not only his own f the revenue due to Government, but also all that aid by the other shareholders, such payment does stitute an admission on the part of the Court of of the minor's liability for the excess revenue so

e a shareholder applies to have his interest dy recorded in the books of the Collectorate, the has no authority to vary the share specified in lication.

Markby, J.—The first point to be decided case is what was the arrangement the parties, that is, between the Mookerjees on the one hand, and the Chatterjees on the other, under which the Mookerjees gave up their claim to a seven-annas share in the profits of lot Bhubunumpore, accepting, in lieu thereof, something which they considered as an equivalent.

The document which contains that arrangement is a decree of the Civil Court of the year 1857. I take that document as set out in the judgment of the Moonsiff, and it recites that the Mookerjees had been receiving profits according to their share from the Chatterjees; that an objection had been raised to their doing so, and hence a suit was instituted, whereupon it was settled that the Mookerjees should, from generation to generation, get from the Chatterjees Rs. 500 per annum out of the profits by certain instalments. The Mookerjees were to have no further connection with the estate, and in case the money was not paid, it was to be recovered by execution of the decree. If the estate was sold by the Government for arrears of revenue, the Mookerjees were to get the surplus sale-proceeds in proportion to Rs. 500; if it were sold privately, or for the debts of the Chatterjees, then Kismut Rampore and Mouzah Rampore, a portion of the estate, was immediately to become the separate property of the Mookerjees, who were to take possession thereof by executing the decree, and were to hold and enjoy the same in zemindary right from generation to generation.

The events which have happened are that successive portions of the property have been sold by the Chatterjees, whether for their debts or voluntarily, I am not quite sure, but not for Government revenue. The first sale was of eight annas of the estate, exclusive of Rampore, in July 1861, to the Chuckerbuttys, whereupon the Mookerjees, as they were entitled to do, took possession of Rampore, and have remained in possession ever since. The representative of the Chuckerbuttys, from the end of the year 1861 to 1870, was a minor, and the property was managed on his behalf by the Court of Wards. The minor is now of age, and is the plaintiff in this suit and respondent in this appeal.

Now, if the only question were who, under these circumstances, was to pay the revenue of Rampore, I cannot say that I should feel any doubt whatever. Had the Mookerjees recovered the seven annas which they claimed, they would have been liable for their share of Government revenue. When they gave up all interest in the estate for an annual

payment of Rs. 500, they would, of course, be freed from all liability; but, when their ownership re-vested in a specific portion of the property, Kismut Rampore and Mouzah Rampore, that ownership would, unless the contrary were expressed, be subject to all the ordinary incidents of ownership, one of which is the liability to pay the Government revenue. There is not a word in this agreement, as far as I can see, to indicate that there was in this case to be any exception to the ordinary rule, which is that the owner shall pay the Government revenue.

The Moonsiff says that the solehnama cannot be considered to stipulate that Brahmanund and the others (the Mookerjees) should enjoy the said Kismut Rampore and Mouzah Rampore by payment of Government revenue thereof, when they took so small a portion of the estate as these villages, relinquishing their seven-annas share of so valuable a property. But it must be remembered that the title of the Mookerjees to the seven-annas share was disputed, and they surrendered all claim to it for Rs. 500 per annum. That, therefore, must be taken as the value of their claim, and there is no evidence to show that Rampore will produce less than Rs. 500 after payment of Government revenue by the respondent.

The District Judge thinks that, because the Rs. 500 paid to the Mookerjees for their share of the profits was free from Government revenue, that therefore they must have been intended to hold Rampore free from revenue also; but I do not see the force of this. A share of *profits* would, of course, be free of any further charge, but a share in the land would, I should say, presumably not be so.

The only part of the case which is calculated to raise any serious doubt is the conduct of the parties with reference to the agreement. Now the facts which have been laid before us appear to be these: The eight-annas share in the property *minus* Rampore was sold by the Chatterjees to the Chuckerbuttys in July 1861, with an express stipulation that the Chuckerbuttys' share of the Government revenue was Rs. 469-9. This was, no doubt, upon the principle that Rampore was to pay its own share of the revenue. The Court of Wards took possession on behalf of the appellant in December 1861, and, during the three following years, the appellants' share of the revenue was paid at this rate. In the three following years, 1865-66-67, much more was paid, *viz.*, Rs. 821, 885, and 635; the whole revenue being 1,068-7-7. Then for two years more a half the revenue was paid on behalf of appellant, and, at the end of that time came of age, and got himself recorded rately for his interest in the property, his of the revenue being fixed at Rs. 4 according to his deed of sale.

I can see nothing in this which consti an admission on the part of the Co Wards that the appellant is liable, the respondents now contend, to pay the whole revenue. The Collector obliged to pay on behalf of his war that had not been paid by the other holders, in order to save the estate from and it is to recover this very excess tha present suit is brought.

As between the appellant and the resp ents, therefore, I cannot feel any doubt we ought to hold that the appellant is l only for Rs. 468-9 of the revenue.

We cannot in this suit ascertain finally liabilities of the parties, because the Cha jees, who sold this property, are not p to this suit.

But, even supposing the truth to be contended by the Mookerjees, that, as bet themselves (the Chatterjees) they have treated as exempt from liability to the ment of any share of the revenue, still will not affect the rights of the appella recover from the Mookerjees their sha the revenue for which the whole of Ram is liable to Government, and would so re until exempted by the proper authority.

The interests of the Mookerjees in R pore would have been wholly destroyed sale for arrears of revenue, and that int has been preserved by the appe having paid more than his share of revenue. There must, therefore, be a d in favour of the appellant against all respondents for the amount of revenue by the appellant on their account, and which they are primarily liable, it being to the Mookerjees to recover back any tion of the money which they will ha pay under this decree, from any p against whom they can establish their c

Upon this basis, the decree will be d up. If any difficulty is found, either may apply again to this Court for f directions.

Birch, J.—It would seem that the Co when he opened a separate account Ram Runjun for an eight-annas share estate, contravened the provisions of s 10, Act XI. of 1859. Ram Runjun, h

lication, specified his share in the estate 7-0-1-1 kranti. If the Collector admitted application, it was not for him to the share specified therein. If any ction were made to the correctness of specification of share, the Civil Court e could decide what the share of the licant was, as provided by section 12. the matter been properly brought before Collector, he would either have registered Runjun's share as represented by him, eferred the parties to the Civil Court, ending proceedings till the question as e share was judicially determined. The oes not authorize him to register as an -annas share a share specified in the ication as 7-0-1-1 kranti share.

The 27th January 1874.

Present:

he Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

ortgage—Foreclosure—Contribution.

Case No. 1726 of 1873.

al Appeal from a decision passed by the ficiating Judge of the 24-Pergunnahs, ted the 21st May 1873, affirming a ision of the Second Subordinate Judge that District, dated the 23rd September 72.

ga Gobind Mundul and others (Plaintiffs), *Appellants,*

versus

otosh Dhur and another (Defendants), *Respondents.*

boos Mohesh Chunder Chowdhry and *howanee Churn Dutt* for Appellants.

s Romesh Chunder Mitter and *Kumla Kant Sen* for Respondents.

interests of a Hindoo widow (R D) in certain having been mortgaged, the mortgagees in due foreclosed the mortgage, and obtained a decree session. Intermediately R D committed default payment of the Government revenue, and her as paid in by her co-sharers who brought a suit R D to recover the amount, and obtained . This decree proving infructuous, they brought ent suit against the mortgagees:

D that plaintiffs were entitled to recover against fendants who had completed their legal title to share, and were entitled, had they chosen, to the payment which she omitted to make:

D that a suit for contribution is not founded upon promise or request; but that the obligation to ts on a different ground, *viz*, that, in *æquali* the law requires equality.

Jackson, J.—The question which arises in this special appeal is a simple question of law. The plaintiffs are 14 annas co-sharers in certain estates of which the other 2 annas were formerly in the hands of one Rumonee Dossee, who was a Hindoo widow. Her interests had been mortgaged to the present defendants under a deed of conditional sale. The preliminaries of foreclosure having been observed, and the year of grace having expired, the conditional sale became perfected on the 30th March 1870. The mortgagees, some time afterwards in 1871, obtained a decree for possession. Intermediately Rumonee Dossee committed default in the payment of the Government revenue, and her share was paid in by the plaintiffs. They afterwards brought a suit to recover that amount against Rumonee Dossee, and obtained a decree, but that decree, it appears, has been infructuous. They now bring the present suit against the defendants to recover the same amount from them. This suit has been dismissed by the Subordinate Judge, and that decision has been affirmed on appeal by the Officiating Judge of the 24-Pergunnahs. The ground on which the District Judge bases his judgment is partly to be found in the passage which the Judge has cited from the decision of the late Sudder Court in the Reports of 1856, page 867, in which the Judges of the Sudder Court limited the nature of what is called "preferable lien;" but that case, from the discussion in the judgment which follows, appears rather to refer to cases of under-tenants than of co-sharers as in the present case.

The Judge says: "The right of contribution exists only against those who are in the position of co-debtors and co-sureties with the plaintiffs, and who are therefore directly liable for whatever their co-debtors or co-sharers have been forced to pay over and above the amount of their own proportionate share of the joint liability." He goes on: "The defendants were not in such a position in relation to the plaintiffs at the time the latter paid up the Government revenue due on the other share of the estate, and the fact that the defendants' interests were preserved by the plaintiffs does not, I think, give them any right of suit against them personally, or a lien on the share of the estate the defendants now hold." It may be observed that in this case the defendants were in the position of persons who had completed their legal title to this 2-annas share. They had only to make a demand for possession, or, as they preferred doing, to bring a suit to obtain

possession at once. Rumonee Dossee therefore was in possession merely by their sufferance. They consequently, we think, were clearly entitled, if they had chosen, to make this payment which Rumonee Dossee had omitted to make. Their payment must have been received by the Collector. If, therefore, they were not *the* persons who were bound to make the payment, they were persons bound, by considerations of common prudence, to pay the arrears.

In the case decided by the Full Bench in 7 Weekly Reporter, page 377, Ram Bux Chittangeo and another *vs.* Modhoo Soodun Paul Chowdhry and others, the late learned Chief Justice, who gave the judgment of the Court, laid down very clearly what the basis of suits like the present is. There had been an idea that suits like the present were founded upon implied promise or request, and the learned Chief Justice shows very clearly that this was entirely a fallacy, and that the obligation to pay rests entirely upon different grounds, *viz.*, that "in *æquali jure*, the law requires equality; one shall not bear the burden in case of the rest." In another passage it is said in page 382: "The "truth is there is no implied contract, either "joint or several, for contribution. The pay- "ment of revenue by one shareholder is made, "not at the instance or at the request of the "others or with their consent, but to save the "estate from being brought to sale for the "arrears. In some instances it may be made "contrary to express directions. In such "cases there is an obligation to contribute, "but surely not arising from an implied con- "tract. The duty of contributing is caused, "not by any convention or agreement between "the shareholders, but arises from the prin- "ciples of justice which require that one "shall not bear the whole burden in case of "the rest, and that all the co-sharers shall "bear the burden in proportion to their "respective shares."

In this case the defendants were the co-sharers, although, by their sufferance, the widow Rumonee Dossee did, for a short time longer, continue in possession. It is objected that Rumonee Dossee at that time enjoyed the rents and profits, and, out of those rents and profits, the revenue ought to have been paid. We have already said that the defendants, if they had chosen, might have obtained these rents and profits, and are not even now debarred from obtaining them from Rumonee Dossee or her representatives. Whether the previous suit was rightly or wrongly brought against Rumonee Dossee, and whether the plaintiffs properly or improperly obtained a decree against her are questions which it is not necessary now to inquire into. It is sufficient to say that the plaintiffs are entitled to recover against the defendants.

Then it is said that, if the Court should be of opinion that the plaintiffs are entitled to judgment, the decree should be limited to their share mortgaged. We see no reason to limit the decree in that way. The amount which is for is a due from the defendants to the plaintiffs, and the plaintiffs are entitled to recover it in any way they can. The judgments of the lower Courts must be reversed and a decree entered for the plaintiffs with costs.

The 28th January 1874.

Present:

The Hon'ble Louis S. Jackson and W. Aitchison, *Judges.*

Insufficient Stamp Duty—Joint Tenancy—Separate Payments.

Case No. 1798 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 23rd July 1873, reversing the decision of the Additional Moonsiff of Burrisaul, dated the 1st July 1872.

Buloram Paul and others (Defendants), *Appellants,*

versus

Suroop Chunder Gooho and others (Plaintiffs), *Respondents.*

Baboo Huree Mohun Chuckerbutty for the Appellants.

Baboo Grija Sunkur Mojoomdar for the Respondents.

Where an appeal had not been valued upon the whole claim, but only with reference to the particular interest of the appellants, but the difference was not large, the High Court, in special appeal, directed that the case should proceed in the Lower Appellate Court upon the appellants paying in the amount of difference in stamp duty:

The fact that, at the foot of a pottah, the rights of the lessee was defined, was held not to bind the lessee to recognize each part as an independent and separate tenure, and the subsequent separate payment of rent by the tenants was held not to vary the nature of the tenure.

Jackson, J.—Three grounds of special appeal have been raised in this case.

that, under the circumstances, the Appellate Court was not authorized e an order of remand, but ought to ried the case itself on the merits, as es had been framed, and the evidence . No doubt, if it were made out to our ction that all the evidence which the had to offer on the several issues had given, we would have been bound to at the Judge ought, as a matter of ure, to have adjudicated the remaining himself; but that is not made out, nor hown that the Moonsiff, who decided e questions of a preliminary kind, had evidence on all the issues.

e second objection taken in special l is that the Lower Appellate Court ot competent to reverse the decree of Court of first instance, because the l made by plaintiffs in the Court below ot valued upon the whole claim, but ith reference to the particular interests e appellants, the appeal being laid s. 476-10 out of Rs. 532-0-9, the al claim. There is no trace of bjection having been taken before the e, because he merely observes that, r section 337, any one of several tiffs or defendants is competent to l against the whole decree when the st affected is common to all. But the ence of value in this case is not large, t appears to us sufficient to direct that case shall proceed upon the plaintiffs, llants in the Court below, paying in the unt of difference in stamp-duty between wo sums above noticed.

he third objection is that the Lower ellate Court ought to have inquired her the tenure, if not in its inception ed, had not been, in fact, severed by the ings and conduct of the parties, the ndants having, it seems, paid always in ties. The only circumstance which s any countenance to the allegation of enure being separate is that, at the foot e pottah, the right of each lessee is ed to be 8 annas. Now this may have at the request of the parties or for the se of avoiding disputes, but it does not the lessor to recognize each part as an endent and separate tenure, nor will the quent separate payment of rent by the ts vary the nature of the tenure. ject, therefore, to the order made above the case shall proceed on payment by plaintiffs, appellants in the Court below, additional stamp-fee, we think this cial appeal should be dismissed with costs.

The 9th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Special Appeal—Remand—Evidence—Benamee Transactions—Copies.

Case No. 260 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 23rd August 1872, affirming a decision of the Moonsiff of Nowadah, dated the 9th October 1871.

Rohee Lall (Plaintiff), *Appellant,*

versus

Dindyal Lall and others (Defendants), *Respondents.*

Messrs. C. Gregory and *J. Younan* and *Baboos Ashootosh Dhur* and *Lukhee Churn Bose* for Appellant.

Baboos Kalee Mohun Doss, Nil Madhub Sen, and *Boodh Sen Singh* for Respondents.

Where the Lower Appellate Court gave very great weight to evidence which ought not to have been treated as evidence between the parties, and this error materially affected his judgment throughout, the High Court, in special appeal, HELD that there had been a mis-trial, and remanded the case for re-consideration.

If it is once established that a transaction is benamee, the mere fact that the deeds and proceedings involved bear the benameedar's name is of no essential weight on the one side or the other of the question, *who is the principal?*

The absence of an original deposition from a record must be satisfactorily accounted for before a copy can be looked at; and such copy should be proved to be a correct copy before it can be used.

Phear, J.—We think that the Judge of the Lower Appellate Court has given very great weight to evidence which ought not to have been treated as evidence between the parties in this suit, and that this error has materially affected his judgment throughout. Consequently, we are of opinion that there has been a mis-trial in the Court below, and that the case must go back for re-consideration.

There are facts in the case which seem to be beyond dispute. The immediate subject of suit is a mokurruree tenure which was mortgaged by the two shareholders of the tenure to a person named in the mortgage-deed as Rookhmoni Kooer. And this mortgage was in 1858 foreclosed in the name of Rookhmoni Kooer, and possession transferred accordingly.

In the following year a mortgage in the shape of a usufructuary lease for 11 years was granted also in the name of Rookhmoni Kooer to one Himmut Ram ; and the period of that mortgage expired in 1870. But possession was not resumed by Rookhmoni Kooer, or any one in her name, at that time. And either Himmut Ram or his representatives, for he at this time is admitted to be dead, continued in possession of the mokurruree tenure down to the present time. And it is the object of the plaintiff in this suit to recover possession of this tenure from these representatives of Himmut Ram upon a title which we will presently mention. The sole question in this suit, or, at any rate, the all-important question in this suit, is, whether or not the plaintiff is representative in title of the person who, under the name of Rookhmoni Kooer, granted the usufructuary lease to Himmut Ram in July 1859 ; for, if he is, there seems to be no substantial defence to the claim which he now makes to recover possession of the property.

We should remark that he only claims an eight-annas share of it. And his story is that Rookhmoni Kooer, in the different transactions which we have mentioned, was only a benamee name for one Bundhoo Lall ; in other words, the original mortgage was made by Bundhoo Lall in the name of Rookhmoni Kooer ; that the foreclosure was effected on his behalf in the name still of Rookhmoni Kooer ; and that the usufructuary lease was granted to Himmut Ram by him also in the name of Rookhmoni Kooer, the benamee state of things which had commenced with the original mortgage thus being continued throughout.

The plaintiff further says that Bundhoo Lall died in 1866, whereupon the property came to his widow Jago Dai, and she in 1870, just at the date of the expiration of the usufructuary lease, sold the subject of the lease in two eight-annas shares ; one to the plaintiff in this suit, and one to the plaintiff in the next suit (No. 296), which has been heard with this. If this story is made out, then it seems pretty plain that the plaintiff is, as regards an eight-annas share, the representative of the person who leased the property in July 1859 to Himmut Ram, and is therefore now entitled to recover that share from the lessee, if that lease or mortgage has expired.

The first set of defendants, who represent Himmut Ram, maintained that this story is altogether fictitious ; that Rookhmoni Kooer was a Brahmin lady, who obtained this property in mortgage on her own acc foreclosed it, and afterwards leased it; that Bundhoo Lall was only her mookh

And, in support of the case thus set Himmut Ram or his representatives, a p representing herself to be Rookhmoni K the original mortgagee and lessor, was a ed to intervene in the suit.

In this state of things, of course, plaintiff and the intervenor, Rookh Kooer, were principal parties to the And the question which had to be tried whether or not the original mortgage-t action, foreclosure, and lease was effect the name of Rookhmoni Kooer for Bun Lall.

The plaintiff brought the two ori mortgagors to speak directly to this and persons better qualified by situati speak to it could not well be. Of cou is possible to conceive that they might have been aware at the time when entered into the mortgage that they dealing with any other person than person whose name was upon the p which they had to execute. But it s that they have pledged their testimon the fact that they knew that the person whom they were dealing was Bundhoo L and not a purdanasheen lady, Rookh Kooer. We have not had their testi read to us, neither is this an occasion which we have any right to consider testimony or the effect of it. It is suffic for us at present to say that the persons came forward to speak directly to fact this kind, if they are worthy to be belie afford the very best evidence that can adduced by the plaintiff in support his case. The deeds bearing the name Rookhmoni Kooer, and all proceedi founded upon them, such, for instance, as suit to recover possession on foreclosure, af no doubt, evidence, so far as they go, in fav of the person who appears on the face them to be the principal person concern *i. e.*, Rookhmoni Kooer, and not immedia of Bundhoo Lall, who is not named in the But this is always the case in all benam transactions whatever. And, if it is o established that the transaction is benam of course the fact, that the deeds and p ceedings bear the benameedar's name, perfectly consistent with the benamee and is of no essential weight on the one side or the other. Now we observe that the Judge has thought that the fact of the proceedings in the suit which was brought to recover possession on foreclosure of the

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gage, appearing all to run in the name ookhmoni Kooer, and of Bundhoo Lall earing there as her mookhtear, afforded strong evidence indeed that Rookhmoni er was the principal, and that this trans- on was not a benamee transaction, as the ent plaintiffs allege that it was. This ence is no doubt worthy of much con- ration, but, nevertheless, it necessarily ves the question who the Rookhmoni er in these transactions really is, and we not sure, having regard to the remarks h have just been made, that the Judge ly dealt with it.

t there is another item of evidence, h the Judge appears to have considered fficient in importance and value of to turn almost entirely the scale against plaintiffs, which, we are of opinion, ought to have been used in this case at all. It e copy of an alleged original deposition ndhoo Lall found in the papers of the closure-suit. It is obvious that the nce of the original deposition from the is a point which ought first to have been red up by unmistakeable evidence before hing purporting to be a copy should e been looked at in the slightest degree. we are told that there is no evidence on record to show how it happened that the inal deposition, alleged to have been e in this suit by Bundhoo Lall, is missing, not upon that record. There is not any evidence that Bundhoo Lall made eposition in that suit. It is true that the ge states in his judgment that the osition is burnt; but there is nothing on record, as we are told, which goes in any to establish that conclusion of fact. t even, assuming that it was satisfactorily ved, in the opinion of the Judge, that the inal deposition of Bundhoo Lall was e in that suit, and was originally upon record, and that it was afterwards burnt, for that reason now absent from the ord, it still was incumbent upon him to e care that the alleged copy, which was ding on the record in the place of the inal, was not used until it was proved by factory evidence to be a correct copy. this case it would be necessary to show it happened that the original was burnt was lost, and how it happened that a y was made and put in its place. One iculty, of course, suggests itself at once, ely, how could a copy have been made the original was burnt. It may be med that the copy was not put on the ord until the original had been destroyed. And therefore, if it is truly a copy of the original, it must be a copy which was made before the original had ceased to exist. Under what circumstances was it made, who made it, and how come it afterwards to be brought to replace the original; all these are most important facts which urgently required to be cleared up before the Court is justified in looking at a copy-document of this kind, and in using it as evidence, affecting most materially the interests of parties to the suit. Nothing is easier, as is unfortunately only too clear from long experience, than for documents of a fictitious and false character to get among the true papers of a record, when it is convenient to parties interested in any case that such documents should be there. And therefore it is most seriously important to the right administration of justice that pretended or professed copies of documents, which are brought forward in this way, should be tested most carefully before they are made use of. The Judge appears to have been so greatly biased by the effect of this alleged copy that he really has given, so far as appears from his judgment, very much less attention to the rest of the case than he ought to have done. He seems to have lost sight of the fact that the plaintiffs had produced the most direct and best testimony that could be brought forward in support of their suit, and to have abstained from looking into the real character of the evidence, or, what is perhaps more important still, the omission or non-appearance of evidence on the part of the defendants. If the defendants' story is a correct one, then they have on their side the person who was the principal in the original transaction, and who could, therefore, have been brought forward to speak to what actually then took place, namely, Rookhmoni Kooer herself. She has not, however, been called as a witness.

Again, the usufructuary lease to Himmut Ram was made only so far back as 1859. Rookhmoni could probably, if her story is a correct one, have proved by direct testimony, that is to say, by the testimony of persons who took a part in the transaction, and who had the handling of the money, what became of the consideration for that usufructuary lease, who received it, who used it, and who had the benefit of it. All this seems to be absent from the case of the defendants. But the Judge has made no remark upon it, and, in fact, we may repeat, he seems to have given very slight attention to that side of the case. Although, again, Himmut Ram is

dead, there are Dindyal and other persons who represent the ticcadar, and who for some time past have been in possession, and might have been expected to give valuable testimony to the facts bearing upon the true nature of the usufructuary mortgage, and who were the real parties concerned in it. But none of these persons have come forward to give their testimony. In a case of this kind it would seem that documents must be comparatively of the slightest value. Evidence of persons who actually were active in and conducting these different affairs, *i. e.*, the different mortgage-transactions, is of the most value. By confronting them, and by proper cross-examination of them, the Court might be placed in the safest way to arrive at the real state of facts.

In this view of the trial which has taken place in the Court below, we think we must reverse the decision of the Lower Appellate Court, and send back the case to that Court for re-trial.

If the Judge, to whom this will go back on remand, should, on consideration of the record, find it necessary to exercise the powers which he has under sections 354 and 355 of the Civil Procedure Code, he will be at liberty to do so.

Costs will abide the event.

The 11th February 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Appellate Court—Reasons—Special Appeal.

Case No. 1790 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of Backergunge, dated the 24th June 1873, reversing a decision of the Additional Moonsiff of Dukhin Shabazpore, dated the 7th December 1872.

Shumshurooddy (Defendant), *Appellant*,

versus

Jan Mahomed Sikdar (Plaintiff), *Respondent*.

Baboo Amarendro Nath Chatterjee for Appellant.

Baboo Doorga Mohun Doss for Respondent.

No general rule can be laid down as to when the reasons should be stated by an Appellate Court for believing one set of witnesses rather than another; and sion of a Lower Appellate Court to state such not a ground for special appeal.

Couch, C.J.—In this case the dinate Judge has said, speaking kobala produced by the plaintiff, that registered one, and it is proved evidence of witnesses that the consid money was exchanged, and that the kob executed, while the vendor, Meanm was in possession. Upon that findi plaintiff would be entitled to succeed; b the defendant's kobala was not reg and there is no finding in the case e to the finding that the vendor, at the the plaintiff's kobala, was in possessi therefore the defendant was not. B objected in this special appeal several grounds which are not grou special appeal at all, but are ob intended to induce the Court to loo the case as a regular appeal) that the dinate Judge should have given some factory reason for reversing the findi the first Court. instead of a bare sta that the witnesses of the plaintiff that his vendor, while in possession, s property to him.

The use of the word "satisfacto certainly not justifiable, because the dinate Judge being the Court of final d upon the facts, he has to determine w his reasons are satisfactory or not. It a question of law whether the reason a Judge may have for believing one witnesses more than another are satisf to the Court of appeal. He has to the question of fact, and putting in the "satisfactory" is improper and alto beside the question which can be rai special appeal.

Then the only question is, was it nec for the Subordinate Judge, when he be the witnesses for the plaintiff who de to the payment of the consideration-m for the kobala and to the vendor be that time in possession, to give his re for doing so. I am not aware of any de of this Court which has gone to that le and none has deen produced. It appe me that it is impossible to lay down general rule as to when the Court s consider that the reasons for a parti finding by the Lower Appellate Court mu stated. There may be many cases in w the omission to state the reasons would re the judgment so unintelligible that this could not pronounce any opinion upon ther it was right in law. In such a cas

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would no doubt require the reasons to ed. But there may be cases in which ourt would not think it necessary to e them. But Mr. Justice Mitter and ustice Ainslie in the case in 16 ly Reporter, page 15, express themselves t effect. This does not appear to me a case in which we need require the s which the Judge had for believing aintiff's witnesses rather than the defend- witnesses to be stated. I would not rage special appeals to be brought on round, and lay down a rule that when- he Judge of an Appellate Court thinks ne set of witnesses is trustworthy, he nd to give his reasons for it. He may a strong and a just opinion on the sub- hen he looks at the whole of the case. not consider that in this case it is neces- to send the case back to him to state he believed this evidence.

e appeal must be dismissed with costs.

lover, J.—I am of the same opinion. impossible to lay down any general and in the case which was referred to hich I was sitting as a single Judge, circumstances were peculiar. There the ge gave no reasons whatever for reversing ng and well-considered judgment of the onsiff, and I felt it impossible to come to conclusion without having those reasons ed. That was the reason why the er of remand was made in that case. In case I concur with the learned Chief tice in dismissing the appeal, as no reasons given why the case should be remanded.

The 11th February 1874.

Present :

e Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Arbitration Award—Act VIII. of 1859, ss. 312 & 326.

Case No. 87 of 1873.

egular Appeal from a decision passed by the Judge of Bhaugulpore, dated the 20th February 1873.

Mr. D. FitzPatrick (Plaintiff), *Appellant,*

versus

Mr. E. Macnaghten (Defendant), *Respondent.*

Mr. G. H. P. Evans and *Baboos Unnoda Pershad Banerjee* and *Mohesh Chunder Chowdhry* for Appellant.

The Advocate-General for Respondent.

As long as the order of a Moonsiff quashing an arbitration award subsists in full force, the award cannot be said to exist as a binding award between the parties.

Phear, J.—In this suit the plaintiff, Mr. FitzPatrick, claimed to recover possession of the entire 16 annas of a certain mouzah Tahai, from which he said he had been wrongfully ousted by the defendant, Mr. Macnaghten. There is no doubt that Mr. Macnaghten did turn him out of possession of this mouzah Tahai, and that up to the time when that event took place Mr. FitzPatrick had been holding the mouzah under a lease which he obtained from the superior proprietor. Moreover, this lease is still subsisting and is in full force.

The only question then in this case is that which arises on the defence of Mr. Macnaghten in this shape—namely, whether a certain award, which he says has been made between Mr. FitzPatrick and himself by arbitrators duly authorized for the purpose, had the effect of transferring the right to the possession of this mouzah Tahai from Mr. FitzPatrick to Mr. Macnaghten, and so justified the taking of possession of the mouzah by Mr. Macnaghten, which is the act complained of by Mr. FitzPatrick.

We have had the papers which purport to be the submission by these two gentlemen, Mr. FitzPatrick and Mr. Macnaghten, of certain subjects of dispute to arbitrators, translated; and have given our best attention to all the proceedings connected with this matter. And it appears to us that the submission to arbitrators was clearly made through the Moonsiff's Court under section 312 or 326 of the Civil Procedure Code. There was a suit pending between these two gentlemen in the Court of the Moonsiff. And apparently also there were other matters of dispute existing between them than that which was involved in this suit. Amongst other subjects of dispute there seems to have been some question pending between the same parties in a second suit, the proceedings of which we have not seen. In this state of things the parties to the first-mentioned suit before the Moonsiff, applied to have the subject of that suit and of the other suit, and possibly other matters of dispute as well, referred to the arbitration of persons named in the application. And the Moonsiff granted the application.

This was either a good submission of the subject of the suit before the Moonsiff under section 312, or it was a good submission under section 326 of matters of dispute

between the parties. And it follows that under the various provisions of Chapter VI. of the Civil Procedure Code, the Moonsiff was from that time forward vested with the jurisdiction to control and to direct the proceedings of the arbitration. He did so, and we find that upon the award of the arbitrators being eventually brought in due course under his notice, and being objected to, he set it aside.

Under these circumstances, we think that there is in law no award existing which is binding between these parties. If the Moonsiff has committed an error in setting aside the award, the person who is aggrieved thereby has a regular course open to him provided by this Chapter of the Civil Procedure Code for setting the Moonsiff right. But as long as the order of the Moonsiff quashing the award subsists in full force, it seems to us that there cannot be said to be an award binding between the parties in existence. And this conclusion disposes of the suit in favour of the plaintiff.

But we think it right to add that, even if it could have been successfully maintained, as the learned Advocate-General contended before us in this case, that the award upon which the defendant relies is an award in a private matter made between the parties, and one that the Moonsiff had no jurisdiction to interfere with, still we should not be satisfied on the evidence before us that it had the effect of giving Mr. Macnaghten a valid right in law to claim from the plaintiff the possession of this mouzah. The submission to arbitration is in itself exceedingly vague: it is almost impossible to gather from it what was the nature of the dispute between the parties relative to boundaries which was submitted to the arbitrators, or the principles upon which it would fall to the arbitrators to decide this dispute. And further, there appears to be no consideration of any kind, proceeding from Mr. Macnaghten, to be a foundation for an obligation on the part of Mr. FitzPatrick to assign or sub-let this mouzah to Mr. Macnaghten. In other words, there is really no sound basis at all upon which Mr. FitzPatrick could be compelled in law to transfer his right of possession and enjoyment of this mouzah to Mr. Macnaghten. It was a pure matter of expediency between the parties; and if Mr. FitzPatrick declined to carry out any arrangement, supposing there had been any, to transfer this to Mr. Macnaghten, there has not been made apparent any consideration for such an arrangement or any ground of obligation upon which he could be compelled by [illegible] of law or in equity to assign the mouzah.

We, therefore, on the whole, are of opin[illegible] that in whatever aspect the case be looked [illegible] the decision of the lower Court is wrong [illegible] must be reversed.

The plaintiff will have a decree for possession of the mouzah with costs in [illegible] the Courts.

The 11th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Mo[illegible]
Judges.

Documents—Secondary Evidence.

Case No. 488 of 1873.

Special Appeal from a decision passed [illegible] the First Subordinate Judge of Bhaug[illegible] pore, dated the 14th December 18[illegible] reversing a decision of the Moonsiff [illegible] Begooserai, dated the 26th Septem[illegible] 1872.

Asman Singh and others (Plaintiffs), *Appellants,*

versus

Doorga Roy and others (Defendants), *Respondents.*

Mr. M. L. Sandel for Appellants.

Mr. R. T. Allan and *Baboo Kalee Kishe[illegible] Sen* for Respondents.

Where a document is named by a plaintiff as th[illegible] best evidence in his favour, he ought not in its absence to be allowed to give any other evidence until the document is accounted for.

Phear, J.—We think that we ought not on special appeal to disturb the judgment of the Lower Appellate Court. The case put forward by the plaintiff made it incumbent upon him to establish first that there was a partition of the bamboo-clump between him and the defendant in the year 1267; and, secondly, that

bamboos, which, he says, were cut down he defendant, were bamboos falling within boundaries of the portion of the bamboo-mp which was allotted to him on partition. it is part of his case that, on the occa- of the partition, a written *phautbun-* was agreed upon, which would of course exactly the boundaries between the es of the plaintiff and the defendant in bamboo-clump. The plaintiff does not, ever, produce this *phautbundee*, and he es almost entirely upon oral testimony ng to show that, since the partition in 7, he has had actual possession of the ion of the bamboo-clump which, he now , the defendant has invaded by cutting n the bamboos.

The defendant, on the other hand, produced nesses to show that this portion of the boo-clump was in his possession, and not the possession of the plaintiff. The ordinate Judge plainly had the whole of evidence before him, because he refers to n some detail in his judgment; and he resses his opinion that the evidence of defendant with regard to possession is in y way credible, and the evidence of the ntiff in that respect is not credible, is not thy to be received or relied upon. While says this, he no doubt gives as some reason his conclusion that there are three great ses of improbability apparent in the plaint- s case. And it is on this appeal complained t he has erred in raising these particular erences of improbability against the plaint- . But, without dwelling upon this, we serve that the Subordinate Judge also says at, according to the case of the plaintiff imself, "the documentary evidence of a *kaubundee* is required." And we think is is perfectly just. Indeed, strictly speak- g, the best evidence in this case of the undary line which separated the portion of e clump belonging to the plaintiff from the ortion of the clump belonging to the defend- t, by his own account, is the *phaut- ndee*, and he ought not to have been llowed to give any other evidence of the undary until this document was accounted r. He has not even—we are told by the arned pleader who appeared for the espondent—called upon the defendant to oduce this document, although he now says e document is in the hands of the defend- t. This being so, he ought not to succeed the case upon the materials which he has oduced in Court.

We, therefore, think that the appeal must e dismissed with costs.

The 12th February 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson and C. Pontifex, *Judges*.

High Courts Act, s. 15—Appeal to Privy Council.

Appeal under section 15 of the Letters Patent against the decision of the Hon'ble W. Markby, dated the 14th August 1873, in Rule No. 171 of 1873, connected with Privy Council Appeal No. 12 of 1873.

Girdharee Singh (Petitioner), *Appellant*,

versus

Hurdoy Narain Sahoo (Opposite Party), *Respondent*.

The Advocate-General for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondent.

Orders made by the High Court under s. 15 of the High Courts Act are subject to an appeal to Her Majesty in Council.

Couch, C.J.—This is an appeal from an order of Mr. Justice Markby made in the Privy Council Appeal Department, admitting an appeal to Her Majesty in Council from an order made by a Division Bench of this Court. It appears that, on the 23rd of November 1872, Girdharee Singh presented a petition to this Court, praying that an order of the Subordinate Judge of Bhaugulpore should be set aside. The petition set out the facts of the case as alleged by the petitioner. It did not conclude with any formal prayer that the sale, which was the subject-matter of the dispute between the parties, should be confirmed, but the Division Bench, consisting of Mr. Justice Kemp and Mr. Justice Glover, granted a Rule calling upon the opposite party "to show cause why the order of the Subordinate Judge, dated the 9th of November 1872, reversing the sale held on the 19th of September 1872, should not be set aside, and the said sale confirmed."

In obedience to this rule, which was dated the 14th of December 1872, the parties appeared, and the case was heard before Mr. Justice Kemp and Mr. Justice Pontifex, on the 11th of March 1873, when it was ordered that the order of the Subordinate Judge setting aside the sale should be reversed, and

the sale confirmed. The facts of the case and the grounds of this decision are fully stated in 19 Weekly Reporter, page 227. It was from this order that Mr. Justice Markby gave leave to appeal to Her Majesty in Council.

It is now objected that the order of the 11th of March is not subject to an appeal to Her Majesty in Council.

The case came before the learned Judges, apparently, under the power which, it has been considered, is given to the High Court by the 15th section of the High Courts Act, to annul or reverse the decisions of Courts subject to its appellate jurisdiction, where the Court considers that there is a want of jurisdiction, or the jurisdiction has been exceeded. If the Court, when it made the order of the 11th of March, had simply exercised the power of annulling or reversing the order of the Subordinate Judge, the case would have gone back to him; and it would follow from the decision of this Court that he would have confirmed the sale. His order confirming the sale would have been subject to an appeal to this Court, and the order of this Court, assuming that the subject-matter was of the appealable value, would have been subject to an appeal to Her Majesty in Council. Instead of this course being adopted, the present appellant took a rule calling upon the opposite party to show cause why, not only the order of the Subordinate Judge should be reversed, but why the sale should not be confirmed, and allowed that rule to be made absolute. In fact, the position which he takes is that, while he seeks to have the benefit of the order of this Court confirming the sale, he contends that there can be no appeal to Her Majesty in Council from it, as it was not made by the High Court on appeal within the meaning of the clause in the Charter which gives this appeal. We think that having as it were asked the Court to make the order confirming the sale, he cannot now be allowed to say that it was not an order made on appeal by this Court. It was only by this Court acting as on an appeal to it that such an order could be made. By the appellant's own act and consent, a procedure has been adopted in which this Court has, as a Court of appeal, confirmed the sale without the intermediate step being taken of sending the case back to the Subordinate Judge by whom the sale would have been confirmed, and then there might have been an appeal to this Court. We think, under those circumstances, it is not open to the appellant to contend that this is an order which was not made on appe and therefore does not come within the 3 clause of the Charter.

Although it may not be necessary in t case to decide the general question whet orders made by the High Court, in exercise of the supposed power which conferred upon it by the 15th section of High Courts Act, are subject to appeal the Queen in Council, we are prepared say that we think they do come within 39th clause. We mean that, if they are strictly within the words, they are within intention of it. This Court is asked, u the power which it is supposed to have reverse or annul a decision of a C subordinate to it on account of a defect law—a want or an excess of jurisdiction. some cases the Court has gone beyond in the grounds upon which it has acted. is true that the case does not come be the Court in the form of an appeal, ei regular or special; but the effect of wh done by the Court in cases of this descript is the same as if the order had been reve on an appeal. If the Court is to exer this power under the 15th section of High Courts Act, we think the words the 39th clause in the Charter should be c strued liberally, and so as to give the pe against whom the decision of the High C is a right of appeal to Her Majesty Council: provided of course that the subj matter is of sufficient value. The words " From any final judgment, decree, or orde the said High Court of Judicature at F William in Bengal made on appeal." If look at the substance, the real result of proceeding, the effect which it has, we th it ought to be considered within the int tion of these words. This opinion does so far as our decision in this case goes, con with the decision of the Full Bench in Weekly Reporter, Full Bench Ruli page 1. There the order was made on application for a review. Whether t decision be a sound one or not, and whe it would be upheld by the Judicial Commit of the Privy Council, it is not necess now to consider. The present case is of different description; and, for the reas which we have given, we think that ord made by the Court under clause 15 of Act of Parliament ought to be subject appeal to Her Majesty in Council. T result, therefore, is that we dismiss th present appeal with costs.

Mr. Justice Jackson, who is not able to b present to-day, concurs in this judgment.

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The 12th February 1874.

Present:

Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Registered Documents—Evidence.

Case No. 833 of 1873.

cial Appeal from a decision passed by the fficiating Additional Judge of Tirhoot, ted the 14th December 1872, reversing a cision of the Moonsiff of Lurbhangah, ted the 5th July 1872.

aikh Fyez Ali (Plaintiff), *Appellant,*

versus

nedee Singh and others (Defendants), *Respondents.*

Baboo Boodh Sen Singh for Appellant.

boo Doorga Doss Dutt for Respondents.

e circumstance that a copy of a document has been ned from the office of a Registrar of Deeds does not that registered document evidence, or render it tive against the persons who appear to be affected terms.

Phear, J.—THE Lower Appellate Court this case placed its judgment almost rely upon the foundation afforded by the y of a certain pottah bearing date 20th March 1869. The Judge says: fter hearing the arguments adduced on th sides, I cannot concur with the Moon- ff in the decision at which he has arrived, r it is very clear to me from a copy of e pottah dated 25th March 1869, obtained om the Registrar's office, and therefore s valuable as the original deed, that it was rawn up during the term and before the xpiry of the first pottah dated 25th ebruary 1868. If there had been no xchange the second pottah would not ave been required, but its terms prove the xchange, so discussion is useless. The rst pottah should have been destroyed hen the second was executed. This was ot done. And unfortunately for the efendant, the plaintiff took advantage of he oversight, which has enabled him to ome into Court in the way he has, otherwise he would have had no excuse for uing for land of which he was not in ossession, and no amount of witnesses can rove dispossession when possession did not exist."

In other words, inasmuch as the plaintiff has to obtain possession of land which he says he obtained by virtue of a pottah dated 25th February 1868, and had all along maintained possession of, while it is proved by a subsequent pottah of the 25th March 1869 that at that date he gave up possession of the first land and took possession instead thereof of some other which was not the subject of suit, therefore the plaintiff's case falls to the ground. The Judge was of opinion that this copy pottah was completely proved, and that it followed from it that after the 25th March 1869 the plaintiff could not be in possession of the land for which he had taken other lands in exchange, and therefore no amount of witnesses could prove subsequent dispossession from it when no possession existed. But the reception of this copy pottah as evidence in the case was objected to by the plaintiff in the first Court. And the first Court found that the defendant (first party) and his vendees "colluded with each other to "release the property from the ticca encum- "brance of the plaintiff, and therefore got up "the second lease without the knowledge "of the plaintiff, and he, Brij Beharee "Singh, himself got the said case registered "by his own admission. Hence such pottah "cannot render the plaintiff's lease null and "void."

This amounts to a distinct finding by the first Court that this copy pottah was not proved to be the copy of any instrument accepted by the plaintiff, and therefore was not evidence in the case against him. This being so, it is quite clear that the Judge was wrong in treating this copy pottah as valid evidence against the plaintiff, without first inquiring and determining whether it really was proved and made evidence against the plaintiff by legitimate testimony. He no doubt says that it is a copy "obtained from the Regis- trar's office, and therefore as valuable as the original deed." If he means to say that such a copy may be used against any person who appears to be affected by its terms, and who does not admit it, without any proof whatever, then he is very clearly wrong. It is in the power of any one who is dishonestly minded to get any document whatever registered in the Registry office. And although a copy which is produced from that office may with some probability be generally taken as a correct copy of some document registered in the office, this circumstance does not make that registered document evidence, or render it operative against the persons who appear to be affected by its terms. A document registered in and brought from a public Registry office requires to be

proved when it is desired that it should be used as evidence against any party who does not admit it, quite as much as if it came out of private custody.

We think, therefore, that the judgment of the Lower Appellate Court as it at present stands cannot be supported. The decision, therefore, of the Court below must be reversed, and the case sent back to it for re-trial.

The costs of this appeal will abide the event.

The 13th February 1874.

Present:

The Hon'ble J. B. Phear and G. G Morris, *Judges.*

Cause of action—Jurisdiction.

Case No. 864 of 1873.

Special Appeal from a decision passed by the Judge of Sarun, dated the 2nd April 1873, reversing a decision of the Subordinate Judge of that District, dated the 15th February 1872.

Munger Meah (Plaintiff), *Appellant,*

versus

Luchmee Narain Singh and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboos Chunder Madhub Ghose and *Taruck Nath Sen* for Respondents.

In a suit for a decree to set aside a mortgage-bond and a decree between other parties in another district, in which plaintiff alleged collusion between those parties with a view to injure him, and that his property had been attached in execution, it was HELD that plaintiff had no cause of action to support the decree which he sought.

Phear, J.—ALTHOUGH we are not prepared to agree with the judgment of the Lower Appellate Court in all particulars, we think that the Judge was correct in his opinion that the plaintiff could not rightly obtain a decree upon his present plaint. After setting out the principal facts of the case, the Judge says: "The appellant," that is, the defendant in the suit and the appellant before the Judge, "urged in appeal that the plaintiff should have sought his remedy in the "district of Tirhoot, under section 290, "Act VIII. of 1859, and I think this contention is a good one, and that as his cause "of action arose in Tirhoot by the bond "being executed and the decree being passed "in that district, that his proper legal "remedy is to be sought also in "district, and that the Subordinate Ju "had no jurisdiction to give the decree w "is now sought to set aside."

The substance of the plaint is that two defendants have colluded together the purpose of injuring the plaintiff, with that view concocted a mortgage-b upon which one of them has got a de against the other in the Tirhoot Court sale of the plaintiff's property which the district of Sarun. And the pla says that in furtherance of this design property has been attached and an orde its sale has been made. He goes on to a a remedy that the bond and the decree w was made upon that bond in the Tir Court should be set aside as colle and fraudulent.

If his case had been simply that defendants had in this particular ma fraudulently endeavoured to injure him, had as a step to that end wrongly attac his property, the cause of action described would, we think, unquestion have fallen within the district in which property lay, namely, the Sarun dist But in that case the proper remedy for plaintiff to ask was that his property sh be protected either by a declaration th was not liable to be sold under the de between the two defendants or by some o form of injunction. But unfortunately plaintiff does not appear to have made attachment of his property a prominent p of his cause of suit, and he has not asked express terms for a remedy which protect that property: he has sought obtain a decree that the bond and the dec in the Tirhoot Court, each of which between other parties, should be set aside.

It is perfectly clear that he has no ca of action which will justify a remedy of kind. He does not show that he is direc affected under the names of either of t defendants in the bond or in the decree, a consequently he could have no right to that either the bond or the decree should set aside as between those parties.

Viewing his plaint in this light, it seem to us, not that he has brought his suit in wrong Court, but that he has brought suit upon a cause of action which is not sufficient cause of action to support th decree which he seeks. We have already said that if he had made the attachment o his property the principal ingredient in h cause of action and had sought to have t property protected, then the right jurisd

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in which such a suit should be brought the jurisdiction within which the property, namely, the district of Sarun.

by remanding the case we could put suit upon the right footing we should been prepared to do so. But it seems that the matter in dispute between the tiff and the defendant cannot properly tried without going back to the first t. If, as seems to be the case, the tiff in substance desires to have his erty protected from the effects of the e which one of the defendants obtained st the other, the first issue which would in the suit is the issue whether or not property in question belongs to the tiff. And that issue has not been raised ither of the Courts below; and so far e know there has been no evidence ced upon which it could be determined. being so, we think that the decision e Lower Appellate Court must remain, without prejudice to the right of the tiff to bring a fresh suit in the Sarun t if he should be so advised.

e think that the appellant ought to have osts in this Court, because, although we not give him success in this suit, the t of our decision is that his right of is preserved to him. It would have lost to him if the decision of the Lower ellate Court had remained untouched.

The 16th February 1874.

Present:

Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

ancement of Rent—Presumption of uniform payment—Consolidation of Holdings.

Case No. 1846 of 1873.

cial Appeal from a decision passed by the Additional Judge of Jessore, dated the 10th July 1872, modifying a decision of the Additional Sudder Moonsiff of that District, dated the 19th September 1871.

Moula Buksh (Defendant), *Appellant,*

versus

Judoonath Sadoo Khan and others (Plaintiffs), *Respondents.*

Bama Churn Banerjee for Appellant.

Baboo Sreenath Doss for Respondents.

In a suit for enhanced rent of land claimed by defendant to be a consolidated holding in respect of which he was entitled to the presumption of uniform payment since the Permanent Settlement, HELD that the presumption could not be allowed as it was found that one of the holdings constituting the tenure was created since the Decennial Settlement, and that the defendant could not at the last stage alter his case and ask for the benefit of the presumption in respect of the rest only.

The purchaser of several holdings of cultivating-ryots cannot, by uniting them and paying one rent for the whole, change their character without the consent of the landlord.

Couch, C. J.—THE plaintiff sued for enhanced rent of land which was in the defendant's possession, and for which he had been paying a jumma of Rs. 51-4-3. It is found by both Courts that this holding of the defendant consisted of several which had been purchased by him, and into one of which, as the Moonsiff describes it, the predecessor of the defendant had been inducted subsequently to the Decennial Settlement It is also found by the Judge that these different holdings were so small that the persons having them at the time they were separate must have been in the position of cultivating ryots.

The defendant contended, up to the argument of the case before us, that this was a consolidated holding which he was entitled to continue to have at the rent of Rs. 51-4-3; that he had paid this for upwards of 20 years, and, therefore it was to be presumed that the land had been held at that rate from the time of the Permanent Settlement.

This presumption cannot be allowed, because, as we have said, it is found that as to one of the holdings, of which what the defendant calls the consolidated holding is composed, it is rebutted. In the case which has been quoted from the 10 Weekly Reporter,* and in the other in the 5 Weekly Reporter,† which is there referred to, all the holdings that were consolidated appear to have been holdings to which presumption would apply, and there was no objection to their being treated as one holding. But that is not the

* Page 117.

† Page 53.

case here, and if the claim of the defendant is to be considered as a claim to a consolidated holding, which is what he has made both before the Moonsiff and the Appellate Court, it is vitiated by one of them having been created since the Decennial Settlement. We do not think the defendant can now be allowed to alter the case which he made in both the lower Courts and ask us to reverse their decrees, or to divide the holding and give him the benefit of the presumption as to part of it. We think the decision which has been appealed from is a right one as regards this question.

Then it is said that the Judge is wrong in overruling the decision of the Moonsiff by which the defendant was treated as a *ganteedar;* and that the rent allowed to the plaintiff ought to be that which would be payable by a *ganteedar*, and as if the defendant held all these lands under a *gantee* holding. We think the defendant could not by purchasing several holdings and uniting them and paying to the landlord one rent for the whole, change their character and make these, which were the holdings of cultivating ryots, holdings of the nature which the defendant now says he is entitled to have them considered.

The landlord might consent to the consolidation and to the alteration in the nature of the holdings, but there is nothing to show that he did in any way consent to that alteration so as to affect the rate of rent that he could afterwards require the defendant to pay. We think in considering what is the prevailing rent payable by ryots of the same class for lands of a similar description, we must treat these holdings as being the same as they were before the defendant purchased them, and that their character has not been altered. Certainly, a respectable gentleman, as we have been told the defendant is, cannot be allowed by purchasing a small holding, the owner of which would cultivate it himself, to alter its character and to say, "I, the purchaser of this holding, "am unable from my position to cultivate "them myself; therefore, I shall make the "landlord treat them as if they were a "different description of tenure from what "they were before." If he could not do that with a single holding by purchasing it, there is no reason that he should be able to do it by purchasing several.

The grounds of appeal against this decision have altogether failed, and the appeal must be dismissed with costs.

The 16th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Mo *Judges.*

Tenancy—Right of Ejectment.

Case No. 916 of 1873.

Special Appeal from a decision passed b Judge of Shahabad, dated the 14th Fe ary 1873, affirming a decision of the A tional Moonsiff of Arrah, dated the September 1872.

Mussamut Tetra Kooer and others (Plaintiffs), *Appellants,*

versus

Bhunjun Roy (Defendant), *Respondent*

Mr. R. E. Twidale for Appellants.

Baboo Nil Madhub Sen for Responde

Where a tenant has not any *gozashta* right, o right either of occupancy or of fixed rent, his te may be determined at any time by reasonable noti that effect. The landlord's right to turn him of possession does not depend upon whether or no tenant had executed a kubooleut for a limited ter years to the landlord's predecessor.

Phear, J.—We think that the judgm of the Lower Appellate Court is imperf with regard to the findings of fact. T Court appears to be of opinion that t defendant is tenant of the plaintiff (inde that relationship is not disputed in the ca and further that the defendant has not a *gozashta* right, or any right either occupancy or of fixed rent. This being it is manifestly in the power of the plain to put an end to the tenancy at any time giving a reasonable notice to that effe And according to the case of the plain such notice was given. The first Court h found as a fact that notice to quit was give But unfortunately the Lower Appellate Cou has not in distinct terms expressed a opinion upon that material question of fac The Judge says: "The *ex-parte* decree an the notice and the oral evidence as to t notice prove nothing." We are unable put any very precise construction upon thi passage. But we think we shall be going too far if we understand it to mean that the Judge has expressed any opinion as to the service of the notice. But this is a cardinal point in the case, and it is impossible to give a final decision between the parti

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il it is ascertained whether or not reason- notice to quit has been given by the ntiff to the defendant. The Judge has arked with some emphasis upon the re of the plaintiff to prove the kubooleut ch he alleged that the defendant executed favour of his predecessor. But it must remembered that the existence of this ooleut does not in any way affect the tance of the plaintiff's cause of suit. e allegation which the plaintiff makes regard to the question of this kubooleut pure fabrication, and has been made by dishonestly, this fact ought no doubt to ence the Judge thus far, namely, make very careful indeed in scrutinizing the of the plaintiff's case. But the right e plaintiff to turn the defendant out of session does not depend upon the question ther or not the defendant had executed a ooleut for a limited term of years to plaintiff's predecessor.

We reverse the decision of the Lower pellate Court, and remand the case for rial on the question whether or not the ntiff served reasonable notice to quit the defendant.

Costs will abide the event.

The 16th February 1874.

Present:

e Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Mesne-profits—Onus Probandi—Liability.

Case No. 350 of 1873.

Miscellaneous Appeal from an order passed by the First Subordinate Judge of Bhaugulpore, dated the 18th August 1873.

Indurjeet Singh and another (Judgment-debtors), *Appellants.*

versus

Baboo Radhey Singh (Decree-holder), *Respondent.*

Mr. R. T. Allan and *Baboos Romesh Chunder Milter, Kalee Kishen Sen,* and *Nil Madhub Sen* for Appellants.

Baboo Chunder Madhub Ghose for Respondent.

In an inquiry into mesne-profits, it is incumbent upon judgment-creditor to give some evidence upon which Court can form a reasonable conception of the ount of his loss, *i. e.*, how much damage he has sus- ed by the loss of mesne-profits, before the judgment-debtor can be called upon to answer any part of the claimant's case.

Mesne-profits ought not to be estimated for any period during which the defendant, who is to be made responsible for them, was not active in keeping the plaintiff out of possession.

Phear, J.—The question which the Subordinate Judge had to determine in this case was what was the amount of mesne-profits which the defendants respectively had received and enjoyed from the time when the plaint was filed up to the date when the plaintiff got possession of the property. This question ought to have been properly heard and determined by the Court itself. And it seems in this case that there were specially good materials before the Court upon which it could have come to a judicial decision. But unfortunately the Subordinate Judge deputed the inquiry to an Ameen; and the Ameen has made a report. The report does not contain an express finding of the amount of mesne-profits. It first points out that the judgment-debtor had failed to furnish the Ameen with jummabundee papers or any other evidence of his collections, and that the judgment-creditor had put in some papers of this kind. Then the report goes on to say that the best mode of estimating the mesne-profits will be to refer to certain other papers and proceedings which are before the Court. And accordingly the report ends with a request on the part of the Ameen that the Court will consult these papers, and will estimate the mesne-profits accordingly.

It is obvious that in this report there is no ascertainment of mesne-profits in any degree. However, on the report coming under the notice of the Subordinate Judge, he says: "Whereas the investigation made by the "Ameen regarding mesne-profits appears "to be correct, and there appears no reason "for interfering with it, it is therefore "ordered that the amount of mesne-profits "ascertained by the Ameen be approved."

This order is, therefore, in truth, a nullity, and must be set aside, and the matter must be remanded to the Subordinate Judge for re-trial.

We take this opportunity of pointing out to the lower Court that, according to the statement of the case which has been made to us, the Court had already before it, irrespective of the papers which the Ameen referred to in his report, the very best materials which could be used for the purpose of determining the mesne-profits in this suit; for we are told that the plaintiff's 2-annas share of the property, as well as the

remaining 14-annas share of the property belonging to the different defendants, was taken possession of by a surburakar or Receiver appointed by the Court under section 243 of the Civil Procedure Code in the beginning of the year 1273; and this surburakar remained in possession during that year and the two following years. The receipts of this officer must *primâ facie* afford the best criterion of the annual value of the plaintiff's 2-annas share, and therefore naturally give the best clue to the probable loss which the plaintiff sustained by having been kept out of the enjoyment of his share by the conduct of the defendant. While these materials were before the Court, it seems to us that it was entirely unnecessary to depute the Ameen to collect other materials; because these would in their nature seem to be very much better than anything that the Ameen could collect. Perhaps we ought to remind the Subordinate Judge that in an inquiry into the mesne-profits it is in the first place incumbent upon the judgment-creditor to give the Court some evidence upon which the Court can form a reasonable conception of the amount of his loss. The Court here, in this instance, as in very many others which are brought under our notice, pursued the course of calling upon the judgment-debtor to show what he had received. The investigation into mesne-profits is nothing more than a continuation of the inquiry which was set on foot at the trial into the merits of the plaintiff's case against the defendant, only that it is limited to the matter of damages. And the defendant ought not to be called upon to answer any part of the plaintiff's case which he does not admit until the plaintiff has given some evidence in support of it; *i. e.*, in the present instance, sufficient evidence of some sort to make it appear at least *primâ facie* how much damage he had sustained by loss of mesne-profits. If, of course, in this case the judgment-creditor had any good reason to contend that the receipts of the surburakar did not afford a good criterion of the profits which he would have received had not the defendant kept him out of possession, it was incumbent upon him to establish this assertion. We do not know that the judgment-creditor was prepared to take up such a position as this, and therefore it seems to us, as we have already mentioned, that the evidence of the surburakar and his accounts would *primâ facie* afford the best ground upon which the Subordinate Judge could have proceeded in his investigation.

The Subordinate Judge appears al have omitted altogether to consider the tion as to the period of time for which mesne-profits had to be estimated. Ac ing to the words of the judgment in this and generally from the nature of the to mesne-profits, mesne-profits ought not estimated for any period during which defendant, who is to be made responsibl them, was not active in keeping the pla out of possession. And therefore it see be very clear that the plaintiff cannot call the defendant, or any of the defenda this suit, to pay him damages for m profits in respect of the years 1273, and 1275, when the possession of his was in the hands of an officer of the C If he is entitled to any of the moneys that officer collected, then he can, of co by a proper application for that purpose that money paid to him by the Court. the defendant cannot be answerable in suit for damages for mesne-profits in re of those years wherein an officer of Court, and not the defendant, was kee the plaintiff out of possession.

With these remarks we reverse the o of the Subordinate Judge, and remand case to the lower Court for re-trial.

Costs must abide the event.

The 16th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Mo *Judges.*

Auction-purchaser — Mortgagee's Lien — P ment into Court.

Case No. 373 of 1873.

Miscellaneous Appeal from an order pa by the Judge of Patna, dated the 3 May 1873.

The Land Mortgage Bank (Decree-holde *Appellants,*

versus

Ram Ruttun Neogy and others (Judgme debtors), *Respondents.*

Baboo Bhowanee Chunder Dutt for Appellants.

Baboo Juggut Churn Banerjee for Respondents.

Auction-purchasers with notice of a mortgagee's are liable to pay off the mortgage, and to satisfy decree which the mortgagee may obtain in regard t

...rty in a suit pending at the time of the purchase. ...decree cannot be satisfied by payment into Court, ...the mortgagee has the means of immediately ...the money out of Court, or acquiesces in such ...ent as payment to himself.

...ear, J.—We think that the Lower ...llate Court has fallen into error in the ... which it has taken of the rights of the ...ment-creditor.

...e auction-purchasers, as they are called, ...bought the property at a sale which was ...in execution of the first decree, bought ... notice of the claim of the Land ...gage Bank, and they therefore became ... to pay off the lien of the Bank which, ...e their purchase, their judgment-debtors ... bound to pay; that is, by their purchase, ...came under the liability to pay off the ...gage which the Land Mortgage Bank ... of this property. They also became ... to satisfy any decree which the Land ...gage Bank might obtain against their ...tion-debtors with regard to this property ...e suit which was pending at the time ... they made their purchase. The Land ...gage Bank did obtain a decree of this ... which gave them a right to be paid the ... amount of the mortgage-debt, with ...rest at 12 per cent. until the date of ...ment; and also the right to have this ...perty sold in order to realize that decree. ... being so, the auction-purchasers under ... first decree became liable to satisfy this ...ree in full out of the property. And ... can only satisfy this decree in full by ...ing to the Land Mortgage Bank the total ...unt decreed with interest up to the date ... payment, whenever that may be. A ...ment of money into Court was not a ...ment into the hands of the Land Mortgage ...nk, unless the Land Mortgage Bank had ... means of immediately taking it out of ...rt, or did anything to show or to represent ... they acquiesced in the payment to the ...rt as payment to themselves. This was ... the case here, because we find that the ...d Mortgage Bank, upon applying to get ... money out of Court, did not succeed in ...ing it. In consequence of objections ...ich the original debtor, under the first ...ree, had made to the sale effected in ...ecution of that decree, the Court refused ... pay out the money. The consequence ...s that the Land Mortgage Bank did not ...eive the money, and were not paid. It ...y be the misfortune of the auction-pur...sers that they have not so discharged ...ir liability as they thought they had. ...d possibly this may not be attributable to ...own fault. But, if so, this circumstance does not disentitle the Land Mortgage Bank to be paid their debt in full. The auction-purchasers, if they are sufferers without fault of their own, will probably be able to obtain some remedy against the persons who have caused them their loss.

The criterion of the Land Mortgage Bank's rights in the matter is afforded by a consideration of that which they would be entitled to as against the auction-purchasers if they had obtained no decree at all, but their mortgage was still merely running and in force. In such state of things, manifestly, their claim against the land could only be discharged by payment of the mortgage-debt and interest in full up to the date of payment. And it seems, therefore, very clear that the Land Mortgage Bank are entitled to the aid of the Court to get complete satisfaction of their decree, and therefore the order of the Judge is wrong, and must be set aside with costs.

The 16th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Decree—Payment into Court—Duty of Judge.

Case No. 364 of 1873.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Patna, dated the 17th July 1873.

Luchmun Pershad (Judgment-debtor), *Appellant,*

versus

Sreeram and another (Decree-holders), *Respondents.*

Moonshee Abdool Baree for Appellant.

Baboo Ashooiosh Dhur and *Moonshee Mahomed Yusuf* for Respondents.

When money is paid into Court by a judgment-debtor in satisfaction of a decree against him and in conformity with the provisions of the Civil Procedure Code, the Court is bound to pay it out immediately on the application of the judgment-creditor, and to inform the judgment-debtor, when asked to do so, what is the amount remaining due from him under the decree.

Phear, J.—This really is not matter of appeal at all. There appears to have been some strange misconception ruling the minds of almost everybody concerned in this case, especially that of the Subordinate Judge. When the Rs. 61,000 was paid into Court in

conformity with the provisions of the Civil Procedure Code, the judgment-creditor was entitled to have it immediately paid out to him upon his application. It was, as far as we can see, a very great mistake on the part of the Subordinate Judge not to immediately comply with the request which, we understand, was made by the judgment-creditor to have this money, Rs. 61,000, paid out to him.

It was also the duty of the Subordinate Judge, when he was asked to do so, to inform the judgment-debtor what was the exact amount remaining due from him under the decree. We think he failed in his duty when (according to the so-called judgment which has come up to us) he postpones giving the judgment-debtor an answer to this question until 12 months hence, when, as he says, the judgment-creditor intends to make another application for execution.

We feel some difficulty as to the proper way of dealing with the question of costs in this appeal. We have already said that it is not a matter of appeal at all, and the petition must therefore be rejected. At the same time, we cannot but say that the petitioner was justified in coming to this Court for relief, when such an order as that which has been passed by the Subordinate Judge was made against him. Under all these circumstances, we think that each party must bear his own costs in this Court.

The 17th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Butwara—Jurisdiction.

Case No. 244 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Tirhoot, dated the 20th August 1872, affirming an order of the Subordinate Judge of that District, dated the 8th April 1872.

Jhaba Lall Roy *alias* Chintamun Roy and others (Plaintiffs), *Appellants,*

versus

The Collector of Tirhoot and others (Defendants), *Respondents.*

Baboo Boodh Sen Singh for Appellants.

Baboo Unnoda Pershad Banerjee for Respondents.

The Civil Court has no authority to order the Collector to make a partition of the jummas payable to Government in respect of mehals which are intermixed in a portion common to all.

Phear, J.—In this case it appears six mehals paying separate revenue Government are intermixed in a po which is common to all, and it is adm by the plaintiff that the proper line separation between them cannot be a tained. The plaintiff, however, seek have a certain specified portion of the which is thus common to all these mehals divided between himself and persons, co-sharers with him.

We are of opinion that this is not a in which a Civil Court has authori order the Collector to make a partition o jummas payable to Government in re of the several mehals. And therefore lower Court was right in dismissing plaintiff's suit. This appeal is dismi with costs.

The 19th February 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Justice*, and the Hon'ble F. A. Gl *Judge.*

Res judicata—Act VIII. of 1859, s. 2—Spli of Causes—Act VIII. of 1859, s. 7.

Case No. 1746 of 1873.

Special Appeal from a decision passed the Subordinate Judge of Jessore, d the 9th May 1873, affirming a decisio the Additional Moonsiff of that Distr dated the 6th November 1872.

Pursun Gopal Paul Chowdhry and othe (Plaintiffs), *Appellants,*

versus

Poornanund Mullick (Defendant), *Respondent.*

Baboo Bipro Doss Mookerjee for Appellants.

Baboo Umbika Churn Banerjee for Respondent.

The dismissal of a suit, because it is considered all the proper parties have not been joined in it, th a decision of the suit, is not a decision on the within the meaning of Act VIII. of 1859, s. 2.

A suit for arrears of rent is not estopped under VIII. of 1859, s. 7, by the fact that plaintiff has spli claim, *i. e.*, the jumma, but the circumstance that part of the jumma has been omitted would be no plaintiff's suing subsequently for such part.

Couch, C.J.—In this case the Moonsi said in his judgment that the suit was brought

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arrears of rent of the year 1277. It ld seem from the judgment of the Subor- e Judge, which we shall afterwards refer hat this is not quite accurate. The siff, however, said that, in regard to the f that year, some of the plaintiffs and ncestors of the remaining plaintiffs had ght a suit against the defendant Poorna- , and that the objection was taken in suit that the jumma had been split, and hat ground the suit was dismissed by Moonsiff, and his decision was upheld ppeal. He then said that a fresh suit rrears of rent for the said year brought plitting up the jumma could by no means ntertained, the suit before him being ilar suit in which the plaintiffs sued 12 annas only out of the 16 annas. He noticed the argument of the pleader, stating that the suit before him had been ught in the same way by deducting the e of an alleged purchaser, concluded by ding that the plaintiffs were bound by the sion in the first suit, and the action was red by section 2 of Act VIII. of 1859, dismissed the plaintiff's claim.

On appeal, the Subordinate Judge begins saying that the decision of the Moonsiff pears to be correct. This is why we have ferred first to the Moonsiff's decision. He ntinues: "There is no doubt that so much f the claim as relates to rents for 1277 up o Pous is incognizable under section 2, Act VIII. of 1859, since the said portion of the laim has been dismissed on merits in a revious suit brought against the defendant, Poornanund, by these plaintiffs, or the persons whom they represent in title. With respect to the remaining portion of the claim" (this is what we referred to hen we said that the Moonsiff did not seem be quite accurate in treating the whole of e claim as being only for the year 1277), we should remark that the plaintiffs have brought their suit by splitting the jumma held by the defendants, but their former suit, which had been brought in the same form, was dismissed on the ground that it had not been brought against the defendant for the whole jumma." He then notices hat was alleged about the defendants aving sold a part of the jumma to another erson, and decides that the plaintiff's suit ould not be maintained on the ground that e jumma or the claim had been split, llowing, as he says, the decision in the her suit.

Two questions then arise in this special ppeal, *first*, whether, in respect of one part of the claim, the lower Courts were right in considering that section 2 of Act VIII. of 1859 applied; and, *secondly*, whether what is called splitting the jumma is an answer to the present suit, or, rather, whether the present suit can be maintained for the 12 annas out of the 16 annas.

The Subordinate Judge says that the former suit was dismissed on the merits. He is not accurate in this; for the former suit was not dismissed on any merits. The Courts did not in any way determine whether the plaintiffs in the former suit were entitled to recover the jumma; whether the jumma was payable by the defendants; but they dismissed the suit, because it was considered that all the proper parties had not joined in it. That is certainly not a decision on the merits. It is no doubt a decision of the suit; but a decision on the merits is not the same thing as deciding the suit. The words of section 2 are that the Civil Courts are not to take cognizance of a suit brought on a cause of action which has been heard and determined. It is not enough that the former suit has been heard and determined. The cause of action must have been heard and determined. The deciding that the suit could not be maintained, because all the persons entitled to the jnmma were not parties to it, and it was only brought for a part of the jumma, was no determination of the cause of action. That was left undecided. Therefore, in this respect, we think both the lower Courts were wrong.

Then, as to the other question, a plaintiff, according to section 7 of Act VIII. of 1859, must include in his suit the whole of the claim arising out of the cause of action, but he may relinquish any portion of his claim to bring it within the jurisdiction of any Court. If the jumma cannot be divided, the whole of the claim arising out of the cause of action is the claim for the whole of the jumma. If the plaintiffs were entitled to the whole, and wished to bring the suit within the jurisdiction of some particular Court by relinquishing a portion of it, they would be obliged to show on their plaint that they relinquished that portion; otherwise the Court would not appear to have jurisdiction. But that is not the case here. There was no necessity for them to show any relinquishment in order to give jurisdiction.

The latter part of the section says: "If "a plaintiff relinquish or omit to sue for "any portion of his claim, a suit for the "portion so relinquished or omitted should "not afterwards be entertained."

The consequence of not suing for the whole of the claim is not that the suit cannot be entertained for so much as the plaintiff sues for, but that he cannot afterwards sue for what he has omitted. In this case the plaintiffs, if they are entitled to the other 4-annas share, would not be able to sue for it. If they attempted to do so, they would be met by the objection that they had omitted it in this suit. They do not now claim it; they say that somebody else is entitled to it; that it has been purchased by some other person. Whether this be true or not, is not a matter to be inquired into now. If the other person should sue for it, the objection may be taken that it could not be divided, and that all the parties entitled have not been joined in the suit. The defendants do not say that any other person is entitled to it. The only question now is whether the suit can be entertained for what is sued for; and the circumstance, that a part of the jumma has been omitted, appears to us, not to be an answer to the suit, but a matter which may be taken advantage of in future proceedings for the recovery of the 4 annas.

The decision of both Courts appear to be wrong, and the suit must be remanded for a re-trial upon the other questions raised between the parties. The costs will follow the result.

The 17th February 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Mortgage—Notice of Foreclosure—Period of Redemption.

Case No. 236 of 1872.

Regular Appeal from a decision passed by the Judge of Midnapore, dated the 29th July 1872.

Wooma Churn Chowdhry and others (Defendants), *Appellants*,

versus

Beharee Lall Mookerjee (Plaintiff), *Respondent*.

Mr. J. P. Kennedy for Appellants.

The Advocate-General for Respondent.

In a suit by a mortgagee for possession after foreclosure-proceedings under Regulation XVII. of 1806, on the ground that the mortgagor had failed to pay the money within one year from the notice, the defence was that the notice had been issued before the lapse of the time stipulated for repayment. The question then became what was the stipulated period? It was found that the period stipulated for the payment of the principal sum was 3rd July 1866; but the deed contained a proviso that, if the mortgagor paid the interest every half-year up to 3rd January 1871, the mortgagee would not enforce his security on the day which had been fixed. As, however, the mortgagor had not performed his part of the engagement, it was

HELD that the time for redemption expired with the period stipulated for the payment of the principal sum, *i. e.*, the 3rd July 1866.

Couch, C.J.—THIS appeal was heard on the 28th of August last before ourselves and Mr. Justice Mitter. It has stood over for judgment for a considerable time in the hope that Mr. Justice Mitter would be able to be present when we gave judgment. Unfortunately, he is not able to be present, and we have thought it better to dispose of the case now; for as Mr. Justice Glover concurs in the opinion I have come to, the result of the appeal would be the same whether Mr. Justice Mitter concured in it or not. I have no reason for thinking that he would not concur. At the time when he was taken ill, he had not, I believe, come to any decided opinion on the subject.

The suit was brought to obtain possession of property mortgaged by a conditional sale, and the plaintiff's case was that proceedings had been taken under Regulation XVII of 1806, and notice issued to the defendants, and they having failed to pay the money within the one year of the notice, the mortgage had become absolute. The plaint prayed that the Court would put him in possession of the property that was mortgaged, and which is specified in the schedule to the plaint.

The defence was that, even if the "deed of mortgage be considered as a deed of conditional sale, still as the period therein stipulated for repayment of the money extended to 3rd July 1871," the notice which the plaintiff had issued was before the lapse of the time stipulated for the re-payment, and was therefore illegal and ineffectual.

The Judge of Midnapore, who tried the case, decided that the stipulated period was, as alleged by the plaintiff, namely, the 3rd of January 1866, and held that the notice

s good, and made a decree in favour of the intiff for possession. From that decree re was an appeal to this Court, and the ly question argued before us was whether, on the true construction of the deed of rtgage, the notice was given at the proper e.

Section 7 of Regulation XVII. of 1806 vides that the provisions contained in sections of the previous Regulation there ntioned are to be applied to the stipued period of redemption. The whole estion is what in this case was the stipued period.

The mortgage-deed, which is dated the of July 1865 and is set out in the paperok, was in the form of an English mortge. After the usual recitals, it is witsed that, in consideration of the sum of 65,000, the mortgagors covenant with mortgagee that they or some or one them, their some or one of their heirs, cutors, administrators, or representves, will, on the 3rd day of January then xt, that is, the 3rd of January 1866, pay the mortgagee, his executors, administors, representatives, or assigns, the sum Rs. 65,000, with interest for the same, the rate of 12 per cent. per annum. ere is then a provision in case of default ng made in the payment of any half-yearly yment of interest for the payment of erest upon it. Then the property mortged is conveyed to the mortgagee in the nner usual in mortgages of this descripn. After this there is the proviso for nveyance or redemption, as follows: Provided always, and it is hereby agreed nd declared, that if the said mortgagors or ny of them, their or any of their heirs, exeutors, administrators, or assigns, shall, on he 3rd day of January next (that is, 1866), ay to the said Beharee Lall Mookerjee, his executors, administrators, representatives, or assigns, the said sum of Rs. 65,000, with nterest for the same at the rate of 12 per ent. per annum, without any deduction, nd all law costs and charges as between ttorney and client, then the said Beharee Lall Mookerjee, his heirs, executors, administrators, representatives, and assigns, shall, at any time thereafter, upon the request and at the cost of the said mortgagors, some or one of them, their some or one of their heirs, executors, administrators, representatives, or assigns, re-convey and reassure the said premises hereby assured unto the said mortgagors, their heirs, executors, "administrators, representatives, or assigns, "according to the nature of the premises, "or as they shall direct."

Down to this part of the deed there can be no question that the stipulated period for the repayment of the principal sum and the redemption of the property was the 3rd of July 1866.

Then comes the clause which has caused the present question to be raised. It is in these words: "Provided always, and it is "hereby agreed and declared that, if the "said mortgagors, some or one of them, "their some or one of their heirs, execu"tors, administrators, representatives, or "assigns do and shall pay the said yearly "interest upon the principal sum of Rupees "sixty-five thousand, or so much thereof as "shall for the time being remain owing upon "the security of these presents at the said "rate of twelve per cent. per annum without "any deduction, by equal half-yearly pay"ments, on the said 3rd day of July and 3rd "day of January in every year during the "continuance of the security (the first of "such half-yearly payments to be made on "the 3rd day of January next as aforesaid), "and do and shall observe, perform, fulfil, and "keep all the covenants, agreements, and "stipulations herein on their part to be "observed, performed, fulfilled, and kept, then "the said Beharee Lall Mookerjee, his exe"cutors, administrators, representatives, or "assigns will not before the said 3rd day of "July one thousand eight hundred and "seventy-one call in the said sum of Rs. "sixty-five thousand, or so much thereof as "shall for the time being remain unpaid."

In considering what is the effect of this clause, we must look at the whole of the deed, and give that construction to it which will reconcile it with the previous parts. The parties having fixed the 3rd of January 1866 for the repayment of the money, we ought not, unless the language compels us, to construe this proviso in such a way as to alter that, and to substitute another time. Looking at the words of this clause, I think the plain meaning of it is that, if the mortgagor paid the interest upon the Rs. 65,000 regularly up to the 3rd of January 1871, the mortgagee would not enforce his security, and would not take advantage of the non-payment of the money on the date which had been fixed. It was an agreement on his part which, if the mortgagor had performed his part, would have had effect, so that he would not have been allowed to take the

steps to foreclose the mortgage which he might otherwise have taken. This construction makes the clause consistent with the other parts of the deed, and gives to it the effect which the mortgagor would be fairly entitled to. I cannot understand or construe this deed as meaning more than that, or as intended by the parties to make the stipulated period for redemption to which the Regulation would apply other than the 3rd of January 1866.

The appellant relied in his written statement on a decision of this Court in 5 Bengal Law Reports, page 389.* That was a different case from the present, and does not appear to me to govern it. There the mortgage was in the English form, and the proviso for redemption or re-conveyance was that in the event of the defendants paying the principal sum on the 4th of September 1868, and in the meantime paying interest on that sum half-yearly, with annual rents, in case of default in such payment, the plaintiff should re-convey the property. It appears to have been contended that default having been made by the mortgagor in payment of the interest, the stipulated period was to be considered as the time when default was made; and that the mortgagee had a right to foreclose the mortgage, although the 4th of September 1868 had not arrived. A Division Bench of this Court held that this was not so, and that the notice under the Regulation could not be given until the time which was stipulated for the payment of the principal had arrived. That is a different case from the present; and the decision rather supports the view which we take in this case, namely, that we are to look at the time which is stipulated for the payment of the principal sum, and that the intention of the parties is to be collected from the whole of the deed. To my mind, in all these cases, it is a question of intention, what have the parties fixed upon as the time for payment. In the present case, I entertain no doubt on the construction of this deed that the stipulated time for payment was the 3rd of January 1866.

I am of opinion that the decision of the Judge of Midnapore is right, and that the appeal ought to be dismissed with costs.

Glover, J.—I concur.

* 13 W. R. 364.

The 19th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Mo
Judges.

Suit for Wassilat.

Case No. 698 of 1873.

Special Appeal from a decision passed the Subordinate Judge of Sarun, d the 13th February 1873, reversing decision of the Moonsiff of Chumpar dated the 11th August 1871.

Dwarkaram Misser and another (two of Defendants), *Appellants,*

versus

Jogessur Lall (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellants.

Mr. R. E. Twidale for Respondent.

In order to establish a claim for wassilat, it is incu bent on a plaintiff to show, *first*, that he was entitled possession during the period for which wassilat is cla ed; and, *secondly*, that he was wrongfully kept out that possession by the defendants for such period.

Phear, J.—This case has been tried v imperfectly in the Court below, and we thi that it must be remanded for a fresh trial.

The plaintiff brought his suit against th defendants, the two present appellants a another, seeking to obtain what is term wassilat for the years 1275 and 1276.

Now, in order to establish this claim, was incumbent upon him to show that h was entitled to possession of the land whic is the subject of suit during these two yea 1275 and 1276. And, in doing this, he woul have to show what was the character of th possession to which he was entitled. Nex he would have to show that the defendant wrongfully kept him out of this possessio during these two years, or part of them And, *thirdly*, he would have to give evidenc upon which the Court would come to reasonable conclusion as to the amount o loss which he had sustained by reason of his having been wrongfully kept out of the possession of the land by the defendants.

It is usual in cases of this kind that the two first points should be established in a separate suit brought to recover possession of the land, namely, *first*, that the plaintiff is

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titled to possession of the land; and, *ondly*, that the defendant has wrongfully pt him out of it. And, if these two points e established in a first suit brought in the il Court, then by the express provisions Act VIII. of 1859, the plaintiff may ng a second suit simply for an assessment the mesne-profits of which he has been prived by the wrongful conduct of the eral defendants.

In the present case no previous suit has n brought in the Civil Court. And the intiff in his plaint seems to have relied the purpose of establishing his right to silat upon a suit which was brought by in the Collector's Court against the e three defendants, and in which suit obtained a partial decree against them. t, manifestly, from the explanation which have endeavoured to give, this previous t and the decree in it could not relieve plaintiff in this suit from the obligation prove the two first points; consequently, lower Court could not rightly come to a ree in this suit without first trying the ues involved in these two points, and iving at a conclusion of fact upon them.

The first Court appears to have taken this rse, and to have tried the case very fairly completely. But, in the Lower Appellate urt, for some reason or other which has been disclosed to us, the Subordinate dge entirely omitted to consider these two t points at all.

The two first defendants alone have pealed, and therefore the matter is nar- wed to a question between the plaintiff and em. We think that the decision of the ower Appellate Court must be reversed, and e case remanded for re-trial upon the three llowing issues:—

First.—Was the plaintiff entitled to the ssession of the land which is the subject suit during the years 1275 and 1276; and, so, what was the nature of the possession which he was entitled?

Secondly.—In the event of the first issue ing established in the affirmative, did the o appealing defendants wrongfully keep m out of such possession as he was entitled during those years 1275 and 1276 or any rt of them? And, if so, then,

Thirdly.—What was the loss occasioned the plaintiff by the wrongful conduct of e defendants in so keeping him out of ssession?

The case must be tried upon the evidence hich is now upon the record.

The costs will abide the event.

The 19th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Rent-suit—Act VIII. (B.C.) of 1869, s. 31—Intervenor.

Case No. 927 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 31st January 1873, affirming a decision of the Moonsiff of Monghyr, dated the 27th July 1872.

Girdharee Lall Singh Pasban (one of the Defendants), *Appellant,*

versus

Chundee Pershad and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale for Appellant.

No one for Respondents.

In a suit for rent, where an intervenor on his own account who pleads a deposit in Court made under Act VIII. (B.C.) of 1869 is made a defendant by the Court, the fact of his being a defendant does not give rise to any equity as between the plaintiff and the other defendants.

Phear, J.—According to the finding of fact come to by the Lower Appellate Court, the present appellant, more than six months before the date of the institution of this suit, deposited in Court a sum of money as rent of the land in respect of which he is now sued. That being so, the plaintiff was barred by the operation of section 31, Act VIII. (B.C.) of 1869, from bringing a suit to recover rent of the same land due antecedently to the date when the deposit was made.

We therefore think that the decision of the Lower Appellate Court is wrong upon its own findings, and that the suit, as against Girdharee Lall, must be dismissed.

We will add that Girdharee came in as an intervenor on his own account, and if the plaintiff had sued him jointly with the other defendants, it would have been difficult to understand how the payment, which was made by him on account of rent, should not have been reckoned to the benefit of the other defendants as well as himself. As, however, he was made a defendant by the Court, that fact does not give rise to any equity as between the plaintiff and the other defendants. Girdharee Lall must be paid his costs by the plaintiff in all Courts.

The 19th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act VIII. (B. C.) of 1869, s. 31—Estoppel.

Case No. 926 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 31st January 1873, affirming a decision of the Moonsiff of Monghyr, dated the 27th July 1872.

Ramdin Singh and another (Defendants), *Appellants,*

versus

Chundee Pershad Singh and others (Plaintiffs), *Respondents.*

Moonshee Mahomed Yusuf for Appellants.

Baboo Boodh Sen Singh and *Moonshee Abdool Baree* for Respondents.

A suit for rent due for a period prior to a deposit being made under the provisions of Act VIII. (B.C.) of 1869 is not barred by s. 31 of that Act, where the contention of the defendants is that the tenure was the depositor's, and that the rent was due from him and not from them.

Phear, J.—We think, on the finding of fact at which the Lower Appellate Court has arrived, that it was right in holding that the plaintiffs' suit against the appellants was not barred by section 31, Act VIII. (B.C.) of 1869. The Judge finds that rent was deposited, or rather money was deposited, on account of rent of lands which are the subject of suit by Girdharee. And section 31 says: "Whenever a deposit on account "of rent shall have been made under the "provisions of this Act, or of Act VI. "of 1862, passed by the Lieutenant-Gover "or of Bengal in Council, no suit shall l "brought against the person making t "deposit, or his representatives, on acco "of any rent which accrued due prior to t "date of the deposit, unless," &c.

It is true that on the finding of the Ju this section would bar a suit agai Girdharee for any rent due before the d when the deposit was made. But this s as far as we are at present concerned, against, not Girdharee, but the appella Consequently that section does not bar it.

As to the other objections which h been made against the judgment of t Lower Appellate Court, we think they a not substantial. The judgment of the Jud no doubt refers very shortly indeed to t evidence. But it does say that, even if t jummabundee papers be excluded, there ample evidence, independently of them, warrant the Moonsiff in decreeing t plaintiff's claim as against the defenda In other words, he is of opinion that t evidence is quite sufficient to establish essential parts of the plaintiff's claim. W are not in a position to inquire whether t is so or not; or to judge of the sufficie of the evidence upon which the other find of the Judge to which we have referred been come to. We think that on spec appeal we ought not to interfere with t decision of the Lower Appellate Court, a that this appeal should be dismissed w costs.

When we said just now that the Jud found that the payment was made Girdharee Lall, we intended to express th we understand him to say that the payme was made by Girdharee Lall on his o behalf within the meaning of the Act, and w not made by him as an agent for, or on beh of, the appellant defendants. And, indeed the Judge had evidence upon which he co base any conclusion whatever upon th point, it must, we suppose, appear certa that the payment was by Girdharee t himself, and not by the appealing defenda in any form, because it is the appellant's o contention that the tenure was Girdharee and that the rent was due from Girdhar and not from them. Of course, if the noti and the declaration which ought to have b attached to the notice were before the Co the matter would have been plain beyond possibility of mistake. We suppose that evidence, whether it was in the shape admission or otherwise before the Jud was sufficient to justify his finding.

The 19th February 1874.

Present:

e Hon'ble J. B. Phear and G. G. Morris, *Judges.*

cient Documents—Inadmissible Evidence.

Case No. 949 of 1873.

rial Appeal from a decision passed by he Subordinate Judge of Bhaugulpore, ated the 5th February 1873, modifying decision of the Sudder Moonsiff of hat District, dated the 23rd November 872.

G. H. Grant (Plaintiff), *Appellant,*

versus

jnath Tewaree (Defendant), *Respondent.*

. R. E. Twidale and *Moonshee Mahomed Yusuf* for Appellant.

aboos Romesh Chunder Mitter and *Rash Beharee Ghose* for Respondent.

Where a sunnud, bearing a seal, and purporting to be ards of 30 years old, was tendered as evidence, but not admitted by the opposite party, HELD that the y tendering it ought at least to have adduced such eace as he was able of custody and of payment of or other acts done according to its terms.

Where the Lower Appellate Court was influenced in iew of the plaintiff's case by such unproved sunnud by farkhuttees similarly unauthenticated, the High t reversed his decision, and remanded the case for ial.

Phear, J.—THE learned pleader, who pears on behalf of the respondent, has felt nself obliged to admit very fairly that the bordinate Judge has treated certain docu-nts as if they were evidence between the rties; and he is unable to contend that these cuments were properly proved, namely, sunnud and a certain number of far-ttees. But he has urged upon us that se have not materially influenced the gment of the Lower Appellate Court in ard to his estimate of the plaintiff's case. We are unable, however, to take this view. eems to us that, if the Subordinate Judge right in treating the sunnud as evidence ween the parties, *i. e.*, as if it had in been proved, and so was fit to be en as evidence between the parties, it have had important weight given to it his case. It is almost impossible to sup-e that the Subordinate Judge was not enced in his view of the plaintiff's case the belief which he undoubtedly held this sunnud was evidence between the rties. It appears, however, that this sunnud was in no respect proved and was not admitted by the plaintiff. The Judge remarks that, inasmuch as it is 30 years old, the defendant could not be expected to prove it. But we need hardly say that this remark must have been made under considerable misapprehension. It is not because a document bears a very important-looking seal and on the face of it purports to be more than 30 years old, that, therefore, it is not necessary to prove it while the party to be affected by it does not admit it. In the case of a document of that sort, it is just as much incumbent upon the person who relies upon it to prove it as if it were a document appearing to have been executed only the day before the trial. The only difference between the two cases is this, namely, that the nature of proof is different in them. In order to prove the authenticity of this sunnud, the defendant ought at least to have adduced such evidence of the custody of the document and of payment of rent according to its terms, or of other acts done in accordance with it, as he was able to bring. If his case be a true one, he must have evidence in his power of that kind. He brought none of it. And consequently the piece of paper decorated with seal, which he calls a sunnud of the Rajah so many years old, must remain, as far as this trial is concerned, simply a piece of paper without being available as evidence on his behalf.

So again with regard to the farkhuttees, the defendant cannot ask to have them looked at and treated as evidence against the plaintiff, unless he proves them to be authentic receipts binding upon the plaintiff. That is, he must give such evidence as will satisfy the Court that they are receipts given on behalf of the plaintiff by some one able to bind him. There is no such evidence on the record with regard to a considerable number of the farkhuttees, and therefore these ought not to have been treated as evidence.

We repeat, it seems to us, that the Subordinate Judge was influenced in his view of the plaintiff's case by this evidence. And as we think that he ought not to have treated these materials as evidence, and ought not to have allowed them to influence his mind, the decision of the Lower Appellate Court must be reversed, and the case remanded for re-trial. And we think it right to direct that upon remand the case be transferred to the Court of the Judge for re-trial.

The appeal will be re-tried in its entirety by the Judge.

Costs must abide the event.

The 19th February 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Civil Court Ameen—Act VIII. of 1859, s. 180.

Case No. 1198 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 1st April 1873, modifying a decision of the Moonsiff of Seetakoond, dated the 28th December 1872.

Ram Dhun Dey (Plaintiff), *Appellant,*

versus

Ram Monee Dey (one of the Defendants), *Respondent.*

Baboo Aukhil Chunder Sen for Appellant.

Baboo Grish Chunder Ghose for Respondent.

A Civil Court is not warranted in deputing its functions to an Ameen, and an Ameen is bound not to go beyond the points referred to him for inquiry.

Kemp, J.—THE plaintiff is the special appellant in this case. The defendant Ram Monee Dey, special respondent, is the plaintiff's brother. It appears that there were four brothers, and that a partition took place in 1221 Mughee into four equal shares. The present suit is brought on the allegation that the bishtnoo mundul lands were held in common; that there were also lâl lands held in common; and that the plaintiff has been ousted by the defendants from one cora of bishtnoo mundul land, 2 gundas 2 coras of ijmalee lâl land, and that the defendants have encroached upon the homestead lands two cubits. The defendants pleaded limitation, and also that the allegation of the plaintiff that the lands were held ijmalee was false; that there had been a separation by metes and bounds which included the lâl lands, and that the bishtnoo mundul lands fell to the share of the defendants. The first Court dismissed the plaintiff's case with reference to the bishtnoo mundul and lâl lands, but found that the report of the Ameen showed that the defendant was in possession of more homestead land than he was entitled to under the partition, and gave the plaintiff a modified decree for possession of 1¼ cubits of homestead land to the north bounded by a straight line drawn due east to west, touching the northern extremity of the base of the mango and nut tree marked M and N in the Ameen's map. The rest of the suit was dismissed. On appeal the Subordinate Judge, Baboo Russick Lall Bose, has dismissed the whole of the plaintiff's suit. He has taken exception to the proceedings of the Ameen, and remarks that he has usurped the functions of the Court; that he has settled issues, taken evidence, and given a decision upon points not referred to him for inquiry. The Subordinate Judge has also found that the evidence adduced by the plaintiff in the case, consisting of four witnesses, that the plaintiff's allegation that the lands were ijmalee was false, and also that the witnesses have failed to prove the plaintiff's case with regard to any portion of the land claimed by the plaintiff.

The grounds taken in special appeal are that the Subordinate Judge was wrong in law in not taking notice as evidence in the case of the report of the Ameen, and of the evidence and documents produced before the Ameen. The second ground is that the Subordinate Judge has passed a decision whatever on the cross-appeal of the plaintiff.

Taking the second ground first, it is clear to my mind that the Subordinate Judge has passed a decision upon the cross-appeal of the plaintiff. He commences his decision by saying that the plaintiff has filed a cross appeal against the decision of the Moonsiff, he also goes into the evidence of the plaintiff, and finds that that evidence falsifies, and so it certainly does, the allegation upon which the plaintiff came into Court, and which was the main averment on which he based his claim, namely, that these lands were ijmalee and not divided.

Then with reference to the other ground there are conflicting decisions of this Court as to how far an Ameen's report may be admitted as evidence in a case. No doubt section 180 of the Code of Procedure lays down that Ameens have the power to call for evidence in matters referred to them; they have also the power to call for and examine documents and other papers relevant to the subject of inquiry, and the section also enacts that the report and deposition shall be taken as evidence in the suit, and shall form part of the record, and in a case to be found in the 9th volume, Weekly Reporter, page 50, decided by the late Justice Bayley and Justice Macpherson, those Judges held that the report of an Ameen and the depositions taken before an Ameen are receivable as evidence in the suit, and that, in the face

provisions of the law, section 180, it not competent to the Lower Appellate t to refuse to consider the Ameen's t and the depositions of the parties and ses examined by him. But, in a later which I may observe is also supported ber rulings of a later date, and which be found in Volume IV., Bengal Law rts, Appendix, page 33,* decided by

* The 19th January 1870.

Present:

Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Case No. 2328 of 1869.

Appeal from a decision passed by the Subordinate Judge of Backergunge, dated the 29th June modifying a decision of the Moonsiff of Prij- dated the 20th June 1867.

hunder Doss (one of the Defendants), *Appellant,*

versus

Kishore Chuckerbutty (Plaintiff), *Respondent.*

Bhyrub Chunder Banerjee, for Appellant.

No one for Respondent.

r, J.—THIS is a suit to obtain a declaration of the 's right of possession to certain land as against ndant. There are therefore two elements in the this suit: *First*, the possession of the plaintiff; *condly*, his title as against the defendant to retain ssession. As far as we can judge from the judgment of the Court below, that Court was nc that the plaintiff had failed to show any title nd as against the defendant. The words of the re: "It appears that plaintiff has failed to pro- his title-deed, the pottah, whereby to show that nds in demand are included within the talook." ally, some other inferior documentary evidence t in for the purpose of supporting title. But the considered that even that evidence did not extend and in dispute. Under these circumstances, it that the first Court sent an Ameen into the il, as the Subordinate Judge says," to ascertain al facts of right and possession and the boundary e place," and the Judge remarks that the Moon- well in doing so. I quite agree with the pleader argued this case on behalf of the appellant that ceeding is entirely unjustifiable. It really ed to deputing the decision of this case to the . This Court has very many times, in reference edings of this kind, expressed its opinion that 180 of the Civil Procedure Code does not warrant Court in deputing its functions to an Ameen, it sends to the locality for the purpose of making vestigation. All that it can charge the Ameen o obtain such information with regard to the features of the place in dispute, the identifica- and depicted in maps with the parcels which ubject of the suit, the identification of maps nother by the aid of objects to be found on the other matters of this kind which may be of and auxiliary to, the proper trial of the suit by t before which it is pending.

hot very clear to my mind from the judgment pper Appellate Court to what extent that Court upon the report which the Ameen, deputed in I have just mentioned, made to the Court. But gather from it that the Subordinate Judge has that report the only evidence of title upon Justices Phear and Mitter, those Judges observe that this Court has very many times, with reference to proceedings of this kind, expressed its opinion that section 180 of the Civil Procedure Code does not warrant a Civil Court in deputing its functions to an Ameen. Now, in this case, there can be no doubt, after reading the report of the Ameen, that he has gone into points far beyond those which were contained in the perwanna appointing him, and he has also usurped to a certain extent the functions of the Court. It is true that the Subordinate Judge has put aside the evidence taken before the Ameen, but he has found, upon the evidence which was adduced in Court by the plaintiff, not only—as supposed by the pleader for the special appellant—that the plaintiff's four witnesses have been disbelieved, because they could not give the precise date on which the plaintiff was ousted by the defendants from a portion of the homestead lands as alleged by the plaintiff, but he has also found that these four witnesses do not prove that the defendant has exceeded his boundary. It is very clear from his decision that he has found that the defendant has not encroached upon the plaintiff's boundary. Therefore, on the whole case, looking to the fact that the plaintiff's allegation that the bishtnoo mundul lands and the lâl lands were ijmalee, has been found to be false on his own evidence and on the evidence adduced by him, and also to the fact that the Ameen has certainly exceeded the instructions received from the Court as to the inquiry to be made

which the plaintiff has been allowed to succeed. In that report, the Ameen states that it appears from the copy of kubooleut filed by one of the defendants, whom he mentions, not the appellant, that a certain plot of land, a portion of which is in dispute, appertains to the howala of the plaintiff, and, upon this statement of the Ameen, the Lower Appellate Court has based its judgment in favour of the plaintiff. The appellant objects to this statement being used in evidence against him, and I think that objection is good. It is obvious that this evidence, if evidence it can be called, is intrinsically of the weakest possible character; and, if it had been adduced and tendered in open Court, the appellant would have been entitled to object to it, and to require that it should be excluded. A copy of a kubooleut simply filed by one of his co-defendants certainly ought not to have been used in evidence against him without his consent; still less, if I may say so, ought the statements of the Ameen sent to make a local investigation with reference to the effect of this copy of the kubooleut to have been treated as anything upon which the Civil Court could act. I think, therefore, that the decree of the lower Court, so far as it was adverse to the appellant, was made without legal materials to support it; and that this appeal ought to be decreed. The decree of the lower Court must be reversed, and the suit be dismissed as against the appellant. The appellant will have his costs in all the Courts.

Mitter, J.—I concur.

by him in this case, and has usurped to a certain extent the functions of the Court, and lastly to the fact that the Lower Appellate Court has found on the evidence that the defendant has not encroached upon the homestead lands, I dismiss the special appeal with costs.

The 19th February 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Auction-purchase—Limitation.

Case No. 1129 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 31st March 1873, affirming a decision of the Moonsiff of Rungunneah, dated the 14th January 1873.

Ahmed Ali *alias* Amanut Ali and others (some of the Defendants), *Appellants,*

versus

Haree Chand (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellants.

Baboo Sreenath Banerjee for Respondent.

Where the plea of limitation is raised to a suit, it is for the plaintiff to set it aside.

Where a decree-holder, after purchase at an execution-sale of his judgment-debtor's rights and interests, sues for a declaration of title and for possession, and defendant pleads that neither plaintiff nor his judgment-debtor was in possession within 12 years prior to the suit, the plea is not rebutted by the fact of the suit having been brought within 12 years from the date of the auction-purchase.

Kemp, J.—THE defendants are the special appellants in this case. The plaintiff purchased the rights and interest of one Ashgur Ali at a sale under section 110 of Act X. of 1859. The plaintiff's purchase is dated the 24th of July 1865. After his purchase, he let out a portion of the land to one Taj Mahomed. Taj Mahomed, the sub-lessee of the plaintiff, not being able to get possession of the lands so leased out, brought a suit against his lessee, the plaintiff, making him a *pro formâ* defendant, and against other parties. That suit was dismissed, and on an appeal to this Court the decision of the lower Court was confirmed. The plaintiff, stating that his rights have been prejudiced by the decision adverse to his sub-lessee, Taj Mahomed, has now brought this suit to have his title declared and for possession, and to have the deed of conveyance set up by the defendants, dated the 14th of Aghran 1217, Mo[illegible] set aside as fraudulent and collusive.

The defendants urge that the clai[illegible] barred by the Statute of Limitation; Ashgur Ali, whose rights have been purch[illegible] by the plaintiff, never owned or held the l[illegible] in dispute; that Hyder Ali was entitle[illegible] the land, and that he sold it to the defend[illegible] ancestors in 1217; and that, ever since year, they have been in possession.

Both Courts have given the plaint[illegible] decree. The first and main ground take[illegible] special appeal is that both the Courts b[illegible] were wrong in law in their adjudication [illegible] the plea of limitation. On referring to[illegible] decision of the first Court, the Moons[illegible] Chowkey Rungunneah, I find that the Mo[illegible] has held that, as the defendant has raise[illegible] plea of limitation, it would be for hi[illegible] make it out. This is obviously w[illegible] Unfortunately, the Subordinate Judge, in[illegible] ing the issue of limitation, has also erre[illegible] law. He holds that, because the plaintiff brought this suit within 12 years from the[illegible] of his auction-purchase, or within 12 [illegible] from the 24th of July 1265, his suit is in[illegible] entirely overlooking the plea of the defend[illegible] that neither the plaintiff nor his judgm[illegible] debtor, whose rights and interest he purch[illegible] at a sale under Act X. of 1859, we[illegible] possession within 12 years prior to suit[illegible] the case had rested on this finding al[illegible] there is no doubt that both Courts ha[illegible] erred in law, the suit ought to be remand[illegible] but I am of opinion that such remand i[illegible] necessary in this case. In 1866 there w[illegible] suit in which Hyder Ali, the defend[illegible] admitted vendor, was plaintiff, appellant, Haree Chand, the present plaintiff befor[illegible] Court, was defendant, respondent, and As[illegible] Ali, whose rights and interest the pla[illegible] purchased, was a party. In that case issue laid down was: Has the plaintiff, [illegible] is to say, Hyder Ali, title and possessio[illegible] the disputed lands? or was the title [illegible] possession with Ashgur Ali, whose rights interest have been purchased by Haree Ch[illegible] the principal defendant in that case? that case of 1866, there was a clear fin[illegible] in the presence of the present plaintiff [illegible] of the party through whom the pre[illegible] defendants derive their title, that the[illegible] session and title were not with Hyder [illegible] but with Ashgur Ali, whose right[illegible] interest the plaintiff purchased. Then it [illegible] also been found by the Lower Appel[illegible] Court, a finding in which I concur, that [illegible] is clearly an attempt on the part of Hy[illegible] Ali to raise a question which was fin[illegible]

...ed against him in 1866. The present ...dant Ahmed Ali is no other person than ...n of Hyder Ali. The kobala purports, ... true, to be from the mother, but it is ...y a collusive transaction which has ...set up to defeat the plaintiff's title and ...ssion which has already been decided ...66. Then there is the fact that in the ...nment chittahs the name of Ashgur ...s registered as in possession of this ...t. Taking this view of the case, I ... it unnecessary to remand it for a clearer ...g on the question of limitation, inasmuch ...e question of possession was decided in ... in favour of the plaintiff's judgment-...r Ashgur Ali, whose rights and interest ...passed to the plaintiff by a sale under ...n 110 of Act X. of 1859.

...e appeal is dismissed with costs.

The 20th February 1874.

Present:

Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

...cipal and Agent—Suit for Adjustment of Accounts—Jurisdiction.

...rence to the High Court by the Judge ... the Small Cause Court at Rajshahye, ...ed the 10th January 1871.

Krishna Kinkur Roy, *Plaintiff,*

versus

...nub Chunder Chuckerbutty, *Defendant.*

...uit by a principal against an agent for adjustment ...vestigation of disputed items of account which ... not be determined within six weeks, and which ...ed the agent with colluding with judgment-debtors, ...eld to be properly triable by the Civil Court, and ... the Small Cause Court.

...se.—THIS is a suit to recover the ...nce of certain moneys said to have been ...ived by the defendant as agent for plaint-...and not accounted for, according to the ... reposed in him. The substance of the ...t is herewith annexed. It charged the ...ndant with collusion with judgment-...ors.

...e plaint was filed in the Moonsiff's ...t at Beauleah, and was returned by the ...siff, after the settlement of issues, for ...purpose of filing it in the Small Cause ...t at Beauleah; the Moonsiff consider-...that he had no jurisdiction to try the ...th reference to the ruling of the Divi-...Bench at page 4, Weekly Reporter, ...e XX. On the case coming on for hearing before me, the defendant was examined; he says that he did not act dishonestly, and that he had duly accounted for all the moneys he had received; that he did not misappropriate any sum of money, or improperly charge the plaintiff with any item of it in his accounts.

It appeared to me that the case involves investigation of various disputed items in the accounts rendered by the defendant in his capacity of agent for plaintiff, which are to be proved by witnesses, some of whom reside at Moorshedabad and elsewhere, and one at Benares; the accounts extending over two years and two months.

Such an adjustment of disputed accounts is, I thought, not compatible with the speedy procedure prescribed for Courts of Small Causes constituted under Act XI. of 1865, and is not capable of satisfactory determination, until all the witnesses cited by both parties were examined, and this cannot possibly be done within the limited period of six weeks allowed for the disposal of a Small Cause Court case.

Application has already been made for the examination of the witness by commission at Benares.

I therefore ordered the plaint to be returned for the purpose of being tried in the Moonsiff's Court with reference to the principle laid down in the High Court's Ruling at page 66, Sutherland's Ruling Book on References from Small Cause Courts.

The plaintiff applied for review of my order, and prayed that a reference may be made to the Hon'ble Court on the point. I admit this application, and accede to his prayer of submitting the case for the opinion of the Hon'ble Judges of the High Court under section 22 of Act XI. of 1865.

The point upon which I solicit the Hon'ble Court's opinion is whether a suit which seeks for adjustment and investigation of various disputed items in accounts extending over two years and two months between the principal and agent, and which charges the defendant with collusion with judgment-debtors in the receipt of money, can be, as a rule, tried in the Small Cause Court? And, if so whether such investigation is compatible with the speedy and simple procedure laid down for the guidance of Small Cause Court Judges, and the ruling of the High Court at page 66 on References from Mofussil Small Cause Courts above cited; *vide* Sutherland's Books of Rulings.

Tara Soondaree Debia
versus
Huro Soonduree Debia and others, decided 6th February 1864.

I, however, still remain of opinion that such a suit should be left to be tried in the ordinary Civil Court. The opinion expressed by the Hon'ble Judges of the High Court in the case cited by the Moonsiff was for the purpose of determining whether a special appeal lies in such a case under Act XXIII. of 1861, section 27, but no such question as has been stated in my reference was directly raised or discussed.

Judgment of the High Court:—

Kemp, J.—We concur with the Small Cause Court. This is a suit which ought to be tried by the Civil Court and not by the Small Cause Court.

The 20th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

A Priori Probability—Appellate Court—Reasons for Difference.

Case No. 814 of 1873.

Special Appeal from the decisions passed by the Officiating Additional Judge of Tirhoot, dated the 18th and 24th February 1873, reversing a decision of the Moonsiff of Durbhangah, dated the 13th August 1872.

Shaikh Mahomed Salleh (Defendant), *Appellant,*

versus

Shaikh Nuseerooddeen Hossein and others (Plaintiffs), *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* for Appellant.

Moonshee Mahomed Yusuf for Respondents.

A matter in issue between parties ought not to be determined merely upon *à priori* probability, however improbable the features of the case put forward by one of the parties.

The Judge of an Appellate Court dissenting from the decision of the first Court is bound to give good grounds why he cannot come to the same conclusion as that Court upon the material evidence before the Court.

Phear, J.—It appears to us from the judgment of the Lower Appellate Court that the investigation of the case in that Court has been most unfortunately imperfect, and that material error has ensued in the determination of the matter in suit between the parties.

The plaintiffs sued to redeem from defendant certain property which they was mortgaged to the defendant in the m of Aughran 1261 by the owner of property under a zur-i-peshgee lease for s years. They say that they are the heirs representatives of the mortgagor, and al that the loan has been paid off by the z peshgee lease; and, upon this statemen the case, they seek to recover, not only land itself, but damages for the los profits which they have been deprived o the over-holding of the defendants.

The defendants admit the original m gage-transaction; they also admit the pl iffs' title by inheritance. But they say at the expiration of the original term of zur-i-peshgee lease, the mortgagor conve to them the whole property, the entire in the property including the equity redemption, for a consideration of Rs. 1 by a kobala which they produce, which was undoubtedly registered at time of its date.

This being the present state of the between the parties, the first issue whether or not Mussamut Tukdeerun, admitted mortgagor of the property, did vey the property to the defendant in Ka 1267, as the defendant said that she And, in the event of that issue being fo adversely to the defendant, the only o issue which would arise between the pa would be whether or not the amount of money advanced to the mortgagor had b paid off by the usufruct, as the plai alleged.

The Lower Appellate Court has de mined the first issue against the defend But it has done so without making the l reference to the evidence.

It appears that the defendants, in orde support the allegation of their purch adduced witnesses who stated that they w present at the time when Mussamut Tuk run executed the kobala, and who depo to all the principal facts which they had opportunity of seeing in connection w this alleged act of purchase and sale.

The first Court very carefully conside the whole of this evidence, and also various considerations which arose out of general circumstances of the parties and the sale-transaction; coming in the end the conclusion that the defendants h satisfactorily made out the affirmative of t issue.

The Judge, however, as has already be mentioned, does not make the same

h

rence to the character and details of this dence. He states that the trial of the occupied two whole days before him, that he heard arguments on both sides at siderable length: and taking the defend-' case as it was presented to him at the , he considered it to be so improbable he entirely discredited both the khtearnama, which was said to have ceded the bill of sale, and the bill of sale. low, we need hardly point out that ough a case put forward by a party to a may appear to present features of very improbability, yet it is not merely upon *à priori* probability that the matter in between the parties ought to be rmined in a Civil Court. The question his suit eminently depended upon the of the testimony which those persons who said that they were witnesses to actual sale-transaction. It may quite be that in spite of all the improbabilities ch the Judge thought attached to the put forward by the defendants, yet it rtheless was true to the smallest item of . The first Court thought it was true, gave its reason for thinking that the obabilities upon which the Judge deter-d the case were entirely outweighed by actual and direct testimony of the sses to the principal and material facts plain to us that the Judge has in the below neglected the most material part e Court's duty in regard to the investi-on which he had to make; for he has given that direct attention to the parol mony which he was bound to give. He pronounced a decision which in effect unts to finding that several witnesses e been guilty of the most deliberate and dulent perjury, without having apparently any degree examined that testimony inquired into the value of these persons' dence. This is very much indeed to be ored, because if the conclusion in this ect at which the Judge arrived is the ect conclusion, then certainly these sses ought, each and all of them, to be d for perjury in a Criminal Court, and a conviction to be subjected to very punishment.

We have already mentioned that the Court first instance based its decision upon a close consideration of the testimony ch these very witnesses gave in this case regard to the material facts; and the e in overruling this decision has not, as ught to have done, expressly stated why not take the same view of the value of that testimony as the Moonsiff took. It is not enough for a Judge of an Appellate Court, dissenting from the decision of the first Court, simply to overrule that decision. He is bound to give good grounds why he cannot come to the same conclusion as that Court came to upon the material evidence before the Court.

We think that the decision of the Lower Appellate Court cannot be supported upon the judgment which has come up to us. We, therefore, reverse the decision and remand the case to the Appellate Court for re-trial. And we direct that upon remand the case be transferred to the file of the District Judge for re-trial.

Costs to abide the event.

The 23rd February 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, J. B. Phear, W. Ainslie, and G. G. Morris, *Judges.*

Sudras—Adoption.

Case No. 88 of 1872.

Regular Appeal from a decision passed by the Judge of Moorshedabad, dated the 1st February 1872.

Beharee Lall Mullick and another (Defendants), *Appellants,*

versus

Indur Monee Chowdhrain (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Hem Chunder Banerjee for Respondent.

Amongst Sudras in Bengal no ceremonies are necessary to make a valid adoption, in addition to the giving and taking of the child in adoption.

This case was referred to the Full Bench on the 27th November 1873 by Couch, C. J., and L. S. Jackson and J. B. Phear, JJ., with the following remarks:—

Couch, C. J.—We think that the following question of law arises in the case, *viz.*, whether amongst Sudras in Bengal, in addition to the giving and taking of the child in adoption, any, and, if any, what ceremonies are necessary to make a valid adoption; and if any ceremonies are necessary, at what time they must be performed. We think the decision on this question in the 4 Bengal Law Reports 162* should be

*13 W. R. (Civil) 168.

considered by a Full Bench, and therefore we refer it for decision by a Full Bench. The further hearing of the case will be adjourned till the answer to the question is returned.

The judgment of the Full Bench was delivered as follows by—

Couch, C.J.—The question referred to us for decision is "whether amongst Sudras in Bengal, in addition to the giving and taking of the child in adoption, any, and, if any, what ceremonies are necessary to make a valid adoption; and if any ceremonies are necessary, at what time they must be performed." We are not asked to decide whether, according to the received law in Bengal, proof of the performance of the *datta homam* is essential to establish a valid adoption in a Brahmin family. It has been held by the High Court at Madras in V. Singamma *vs.* Vinjamuri Venkatacharhe, 4 Madras High Court Reports 165, not to be essential; but a Division Court of this Court held in the case in 4 Bengal Law Reports that it was.

The Madras decision was not noticed either in the argument or the judgment. It not being necessary to decide this question in the appeal in which this reference is made, we do not propose to do so, and shall only consider what is the law of Bengal in the case of Sudras.

We refer first to the Dattaka Mimansa. In section 1 the author treats of by whom adoption may be made. Having stated in verse 15 and the following verses when a woman may adopt, he says in verse 24: "It "must not be argued that since under a text "of Cannaka the employment of a priest is "according to the approved doctrine the "*homa* may be completed by his interven- "tion; for although that were completed, "still would the adoption (by the woman) be "imperfect, since she is not competent to "perform the prayers requisite for the same." And in verse 25 the prayers are specified. This is an assertion that notwithstanding the incompetency of a woman to perform the requisite prayers, there may be a complete adoption by her, and that this is not by reason of the intervention of a priest. The Sudras being also incompetent to perform the prayers specified, the author notices their case; and in verse 26 says: "Nor does thus "the want of power of Sudras follow, for "their ability (to adopt) is obtained from an "indication (of law) conclusive to that effect "in this passage: 'Of Sudras from amongst "those of the Sudra class.' By this Vach "pati is refuted, who says: 'Sudras "incompetent to affiliate a son, from t "incapacity to perform the sacrament of "*homa* and prayers prescribed for a "tion.'" The text of Cannaka thus refe to is given in section 2, verse 74. When author says Vachespati is refuted, he pla affirms that the incapacity of Sudras to form the *homa* and the prescribed pra does not make them incompetent to ad He then in verse 27 states in what ma the competency is produced. It treats adoption by women and concludes: "Th "fore since by this passage (of women "Sudras without prayers) a dispensa "with respect to prayers is established, "adoption (of the women in question) wo "be valid without prayers; like their "ceptance of any chattel."

Thus we have it distinctly laid down Sudras may adopt, and that an adoption Sudra without prayers is valid, because t is a dispensation with respect to prayers. would be surprising if any passage from author could be produced which would b authority for saying that an adoption b Sudra without the ceremonies is invalid.

In section 5 the author treats of the m of adoption. A Sudra is expressly mentio only in verse 29, where it is said that ought to bestow as a gratuity on the offic ing priest "the whole even of his prope if indigent, to the extent of his means." order to make the author consistent, the r prescribed in this section must be und stood as subject to the qualification that person adopting is capable of observ them. It is not to be supposed that author intended to contradict what he h before laid down about women and Sudr and the concluding verse 56, "It is th "fore established that the filial relation "adopted is occasioned only by the pr "ceremonies: of gift, acceptance, a b "sacrifice, and so forth, should either "wanting—the filial relation even fails" must be understood as only applying wh there is a capacity to perform the ceremoni To give any other meaning to it would ma the author absolutely contradictory. In part of his work he would be saying th Sudra can adopt, and in another that adoption by a Sudra is invalid, because ce monies have not been performed which was incapable of performing, and which t author had said he was exempted from p forming. The doctrine in the Datt Chandrika, which is preferred in Bengal, d

t differ from this. On the contrary, ses 29 and 32 of section 2 support it.
The text of Menu quoted in section 5, se 3, must be understood as applying to e who are capable of observing the ined rulés, and not to Sudras. The sion in IV. Bengal Law Reports, Appel- Jurisdiction, 162,* which made this ence necessary is based upon a passage e Vyavastha Darpana, 2nd Edition, 875, re the author quotes as an authority for he lays down a passage from the Dattaka aya, but it appears that the whole of the ence is not given. After "a Sudra also ld act in like manner," are the words d even without the performance of s, &c., the adoption is valid." Thus uthority given by Shama Churn Sircar his position proves to be no authority for ut the contrary.
he decision appears to us to be unsup- d by any authority. 2 Strange 89 may cited as a contrary authority. The iety alluded to at page 170, if the tice had a modern origin, as is probable, d not be a sufficient foundation for a of law. We think we ought to overrule decision, and answer the question put to y saying that amongst Sudras in Bengal eremonies are necessary in addition to giving and taking of the child in tion.

The 23rd February 1874.

Present:

Hon'ble J. B. Phear and G. G. Morris, *Judges.*

e by Guardian—Suit by Minor—Purchase-money.

Case No. 939 of 1873.

ial Appeal from a decision passed by e Officiating Judge of Patna, dated e 30th September 1872, affirming a cision of the Subordinate Judge of at District, dated the 14th March 1872.

Muthoora Doss (Plaintiff), *Appellant,*

versus

Kanoo Beharee Singh and others (Defendants), *Respondents.*

. C. Gregory, *Baboo Mohesh Chunder Chowdhry,* and *Moonshee Abdool Baree* r Appellant.

Mr. R. E. Twidale and *Baboo Romesh Chunder Mitter* for Respondents.

a suit to recover property which was sold by iff's guardian while plaintiff was a minor, the burden lies upon the defendants to show that there was such a necessity for the sale as would serve to give the guardian legal authority to sell, or that upon due inquiry defendants were reasonably led to suppose that such necessity existed.

Where defendants fail to show that they obtained a good title by their purchase, but it appears that the purchase-money was applied in any way to the minor's benefit, the latter is not to be entitled to a decree for immediate possession without also refunding the said money with interest, a set-off being allowed him for net rents and profits for the time the property was in the possession of the defendants.

Phear, J.—THE defendants in this suit purchased the property which is the subject of suit from the guardian or guardians of the plaintiff during his minority, for the sum of Rs. 5,000. The plaintiff seeks to recover this property from the defendants upon the allegation that his guardian had not authority to sell the property, and that accordingly the defendants obtained no title to it by virtue of their purchase.

The defendants admit the fact of the purchase from the plaintiff's guardian, and consequently the burden lay upon them to show that there was such a necessity for the sale at the time when it was made as would serve to give to the plaintiff's guardian authority to sell the property, or that upon making due inquiry at that time they were reasonably led by the results of that enquiry to suppose that such a necessity existed.

It seems to us that the Lower Appellate Court has carefully abstained from finding as a fact upon the evidence before it that at the time of the sale such a necessity existed as served to give the guardian authority to sell. And he has not in distinct terms found that the other branch of the alternative is satisfied, namely, that the defendants made due inquiry into the existence of the necessity, and were reasonably led upon that inquiry to believe that there was a necessity.

The Judge says that it is enough for the success of the defendants in this suit, if it appears on the evidence that there was, as he terms it, "apparent necessity" for the sale. And upon a review of the evidence he arrives at the conclusion that there was an apparent necessity of this kind. But in this we think the Judge was wrong in law. Nothing short of an actual necessity will give legal authority to the guardian to sell, though, as has more than once been explained in this Court, if the intending purchaser has done all in his power to ascertain the facts as to the necessity, and has been honestly led upon due inquiry to think that there was such a necessity, this belief so founded on his part will, in a suit brought against him by the minor to recover the property, be reckoned in

* 13 W. R. (Civil) 168.

the place of actual necessity; because it would be inequitable under those circumstances that he should be deprived of his purchase.

If then in a suit of this sort there is not an actual necessity for the sale, the defendants can only succeed in maintaining their title by showing that they honestly believed that such a necessity existed, and were led to that belief by the course of a reasonable inquiry made by them for the purpose of ascertaining whether the necessity existed. We have already said the Judge does not find that the defendants made any inquiry of this kind, and were in pursuance of it led to a belief that there was a necessity. In truth, we now learn that there is no evidence on the record of the defendants having at any time made an inquiry. The "apparent necessity" of which the Judge speaks, is something which, if apparent at all, is apparent entirely independently of the defendants.

On the whole, then, it seems to us that the finding of the Lower Appellate Court does not support the decision at which that Court has arrived, because upon that finding the plaintiff was entitled to have it declared that the defendants did not by their purchase obtain a good title to the property. He did not however at once get a right to the decree for the immediate possession of the property, because, if as is found to be the case by the Lower Courts, the consideration-money was paid to his guardian, and if through the hands of his guardian that money was applied in any way to the minor's benefit, he would not be in equity entitled to have the sale set aside and to get back the property without also doing on his part equity, by refunding the money which had been received and applied to his advantage, with proper interest upon the amount.

There was an issue raised in this case between the parties as to the misappropriation of the money by the plaintiff's guardian. And that issue was found adversely to the plaintiff's contention: in other words, it was found that the guardian had not misappropriated the money. It is to be taken then that the money went to the plaintiff's benefit. This being so, he is bound as a condition precedent to his getting the property back into his own hand to repay the purchase-money with reasonable interest upon it. At the same time, he is entitled to recover from the defendants the net rents and profits which he would have received, or which his guardian would have received on his behalf, had it remained in his guardian's possession during the time over which the defendants have held it. This amount has not been ascertained, and there must be an inquiry for the purpose of determining it.

We think that the proper decree will be that the decision of the Lower Appellate Court be reversed; that the defendants' purchase be declared null and void; and that the plaintiff have a decree for possession of the property upon his paying to the defendants the sum of Rs. 5,000, with interest thereon at 12 per cent. per annum from the date when it was paid by the defendants to the date of its repayment by the plaintiff, and that the defendants do pay to the plaintiff such sum by way of wassilat as the net rents and profits during the period for which the plaintiff was out of possession may be ascertained to amount to. The difference between these two amounts must be paid either by the plaintiff or the defendants, as the case may be, as soon as the wassilat has been ascertained. And we direct that there be an inquiry instituted for the purpose of ascertaining the amount of this wassilat.

We think that the plaintiff must be paid his costs in this Court and in the Court below incurred up to the present time, and that each party must pay his costs of the proceedings necessary for ascertaining the wassilat.

The 23rd February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Mor*Judges.*

Costs—Objections to Execution.

Case No. 384 of 1873.

Miscellaneous Appeal from an order pas by the Subordinate Judge of Tirh dated the 26th August 1873.

Gunesh Dutt Singh (Judgment-debtor), *Appellant,*

versus

Munguy Ram Chowdhry and others (Decree-holders), *Respondents.*

Baboo Nil Madhub Bose for Appellant.

Mr. C. Gregory and *Baboos Hem Chund Banerjee* and *Boodh Sen Singh* for Respondents.

Where costs are decreed, it is not the actual expenditure that is intended, but a lump sum of money in

of, estimated in a certain proportion to the value of mit.

the objections which a judgment-debtor has to to a judgment-creditor's application for execution ld be made simultaneously.

Shear, J.—We think that the decision of Subordinate Judge is correct. The e of the High Court gave to the ndants, appellants, as against the respond- their costs in the first Court. The ning of that is, it gave each party of defendants, appearing separately, its rate costs.

ccording to the practice of the Courts his country, the costs which fall to be under an order for payment of costs are the actual expenditure which the parties have been put to, but a lump sum of ey in lieu thereof estimated in a certain portion to the valuation of the suit. This matter of general expediency, and the object of the rule is to avoid the ulty which would otherwise be experi- d in the Mofussil Courts of checking ascertaining, in the case of each party, actual expenditure to which he had been

e think that there can be no doubt that, n the Court orders the defendants, king of them collectively, to be paid costs by plaintiff, it means that each ndant who appeared in the suit as a rate party is to be paid his separate ts, estimated in this way.

We also think that the Subordinate Judge right in the opinion which he expressed all the objections which the judgment- tor had to make to the judgment-creditor's plication should be made at once. In this tance, the judgment-debtor seems to have n content at first with objecting that the plication was barred by limitation. And r that objection had been disposed of on peal carried to the highest Court in this ntry, he presented another objection to same application, namely, the objection ich we have now to consider. The bordinate Judge would have been right if had declined to entertain the second jection on the ground that, if made at all, it ght to have been made simultaneously with e first objection; because, plainly, if the dgment-debtor is justified in putting ward only one objection at a time, and n waiting to see what will be the ultimate ult of that objection before he puts ward another, he may, at his own will, ay the execution-proceedings for any mber of years. It would be in his power, by setting up objection after objection, no matter how frivolous, to prevent the judgment-creditor from getting fruition of his judgment within any reasonable time.

We dismiss the appeal with costs.

The costs must be separate costs for each party who appears separately.

The 24th February 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Act II. (B. C.) of 1866—Hiring out Licenses—Contracts contrary to Public Policy.

Case No. 1869 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of the 24-Pergunnahs, dated the 4th June 1873, reversing a decision of the Sudder Moonsiff of that District, dated the 29th June 1872.

Judoonath Shaha (Defendant), *Appellant*,

versus

Nobin Chunder Shaha and others (Plaintiffs), *Respondents.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Omurnath Bose for Respondents.

The intention of Act II. (B. C.) of 1866 is that the person who has the license shall "keep," *i. e.*, dwell in, and have the management and control of, the shop or place of entertainment. A contract by which he lets the shop and the use of the license for a fixed term, receiving rent, is contrary to the policy of the law, and comes within the rule that a contract which is illegal, or is contrary to public policy, cannot be enforced.

Couch, C.J.—The suit was brought by the plaintiffs, the owners of, and having a license for, a wine shop at Kidderpore which they had let to the defendant on condition of his paying, to them, an annual profit of Rs. 26, and to the owners of the godown in which the shop was, the monthly rent.

The Moonsiff of Alipore, who tried the suit, said that, out of the several issues in bar and on the merits fixed in this case, he should confine himself only to two: "*first*, whether "or not the contract is against public policy "and legally unenforcible; *secondly*, whether "the plaintiffs are barred from recovering "their right to the license on account of "their having withdrawn their claim to khas "possession of the godown."

Whether the objection that the contract was void as being against public policy was

taken before or after the plaintiff and his witnesses had been examined is not material; for the Moonsiff not only had power, but it was his duty, when this issue appeared to be necessary for the right determination of the suit, to add it and to try it. No doubt, the plaintiffs were aware that such an issue was about to be decided by the Moonsiff, and they might have asked to be allowed to give further evidence, if there was any, that could be usefully given. As to their giving any evidence of a custom, as it has been suggested they might have, if the custom was contrary to law, it would be a useless and improper proceeding.

The Moonsiff upon these issues decided in favour of the defendant, and held that the suit ought to be dismissed.

From this decision there was an appeal, and the Subordinate Judge has reversed the Moonsiff's decision, and remanded the case for him to try it on its merits. The reason of the Subordinate Judge for considering that the plaintiffs were entitled to recover seems to be that, as the plaintiffs were admittedly the owners of the shop and the holders of the license, they were entitled to recover it from the defendant, who held it under a contract from them. And he held that there was nothing in the contract which prevented the plaintiffs from recovering upon it.

The case depends upon the provisions of Act II. of 1866 of the Bengal Council, which provides for the granting of licenses for keeping hotels, taverns, wine-shops, and shops where spirits are sold. The 18th section imposes a penalty upon a person who has or keeps any such place without a license; the 19th provides that an excise-license is not to be granted without a certificate of the Commissioner of Police; the 20th speaks of the duration and conditions of the license, and contains these words which are material as showing what was intended: "The Com- "missioner of Police, subject to direction "and control of the Lieutenant-Governor, is "to limit in the certificate the period for "which the license is to be granted, and also "to fix such conditions as he may deem "necessary for securing the good behaviour "of the keepers of the houses and places of "entertainment as aforesaid, and for the "prevention of drunkenness and disorder "among the persons frequenting them."

According to these sections, the person to be licensed is the keeper of the shop, and it is intended that it shall be kept by the person who has the license. Keeping a shop is not letting it out to another person, and receiving a rent for it. A man who lets a house or shop to another cannot properly be said to keep it; and when the law speaks of the keepers of these houses or places of entertainment, it must mean the persons who really keep them, that is, the persons who dwell in, and have the management and control of, them. This is what must be understood by keeping a house of entertainment.

That this is the meaning is shown by the words of section 23, which says: "Any per- "son committing a breach of any of the "conditions of a license granted either "under section 19 or section 22 of this Act "shall, on conviction before a Magistrate, be "punishable by a fine not exceeding one "hundred rupees, and such fine shall be "recovered from the person licensed, notwith- "standing that such breach may have been "owing to the default or carelessness of his "servant or other person in charge of the "shop or place of sale."

Taking these sections together, it is clear that what is intended is that the person who has the license shall keep the shop or place of entertainment, and shall be liable for the acts of his servant or the person who may be in charge of it. A contract of this kind by which he lets the shop and the use of the license for a fixed term, receiving rent, is contrary to the policy of the law. It is in fact a contract to do that which the law intended should not be made, and it appears to us to come clearly within the rule that a contract to do that which is illegal, or is contrary to public policy, cannot be enforced.

We refer to a decision in the English Courts, not because any such authority is necessary, or ought to be sought for there, but as illustrating the application of the rule in a case like the present. It is the case of Ritchie *vs.* Smith, 6 Common Bench Reports, page 462, where it was held that an agreement, the object of which was to enable an unlicensed person to sell excisable liquors contrary to the 9 Geo. IV., c. 61, was on that ground illegal; and it was laid down by a very eminent Judge, Mr. Justice Maule, that an agreement having for its object the carrying on a trade in contravention of the excise laws is illegal. This case is exactly like the present.

We think the decision of the Subordinate Judge is wrong. The Moonsiff had come to a right decision, and we must reverse the decision of the Subordinate Judge, thereby allowing the decree of the Moonsiff to stand. And the appellant must have the costs in the Lower Appellate Court and in this Court.

The 24th February 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

drawal of Suit with Permission—Issues.

Case No. 1291 of 1873.

l Appeal from a decision passed by Subordinate Judge of Sylhet, dated 18th March 1873, affirming a decision the Moonsiff of that District, dated 22nd November 1872.

dun Ram Doss (one of the Plaintiffs), *Appellant,*

versus

Israil Ali Chowdhry and another (Defendants), *Respondents.*

Grish Chunder Ghose for Appellant.

Ir. M. L. Sandel for Respondents.

intiff cannot be permitted to withdraw with to bring a fresh suit, after issues have been and he has failed to produce evidence to support m.

RE is only one ground of special l in this case, and that is that the Courts were wrong in not permitting ppellant to withdraw with permission ng a fresh suit, inasmuch as they did quire whether the grounds upon which pecial appellant prayed to be permit- o bring a fresh suit were sufficient t. It appears in this case that the iff had on a previous occasion with- his suit with permission to bring a suit, and the present suit was brought e 10th of May 1872. The written ent of the defendant was filed on the f June 1872, in which the plaintiff's nd possession are clearly traversed. quently, the defendant applied, stating is documents had been filed in the first hich was withdrawn by the plaintiff, e asked to be permitted in the present file another document, and this was Immediately after that, or considerably than one year, or one and half year he plaint was filed, and when the wit- were going against the plaintiff's claim, aintiff again applies to be permitted to aw with liberty to bring a fresh suit. the Courts below were quite right in llowing any such privilege. There is ision to be found in Volume XII., y Reporter, Privy Council Rulings, 44, in which their Lordships hold that cases in which the suit fails by reason of some point of form the parties may be allowed to withdraw the suit with liberty to bring a fresh suit, but not in a case like this in which issues were joined and the plaintiff failed to produce evidence in support of his claim.

The special appeal is dismissed with costs.

The 25th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Execution-sale—Jurisdiction—Act VIII. of 1859, s. 257.

Case No. 104 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Patna, dated the 4th February 1873.

Kanhaye Singh (Plaintiff), *Appellant,*

versus

Oomadhur Bhutt and another (Defendants), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Messrs. R. T. Allan and *R. E. Twidale* for Respondents.

A suit to recover property alleged to have been sold in execution by a Court which had no jurisdiction is not barred by Act VIII. of 1859, s. 257.

Phear, J.—We think that the reasons given by the Subordinate Judge for dismissing the suit are erroneous. He says: "Under the Procedure Code of 1859, a "judgment-debtor, if aggrieved by any "material irregularity in the sale, may prefer "his objection within 30 days from the date "of the sale, and should his objection be "disallowed, may appeal; but he is "expressly precluded by section 257 from "bringing a regular suit to contest the sale." And accordingly he says: "The suit is dismissed."

It seems to us that section 257 does not apply to the present case, so far as we can understand the present case of the plaintiff at all. The ground of action upon which the plaintiff relies appears to be this, namely, that his property has been sold by a Court in execution of a decree, which Court had no jurisdiction to sell the property. And he says that this was done fraudulently in order to injure him. But putting this allegation of fraud out of the way, the

substance of his plaint is that the defendants never obtained any title to the property by virtue of the purchase which they made at the execution-sale. And if this allegation of fact be substantiated, we think that section 257 does not apply.

That section only refers to cases in which a Court having jurisdiction to sell the property and to pass a good title, provided it proceeds regularly according to the provisions of the Procedure Code in that behalf enacted, commits some irregularity of such a kind as would under the provisions of the same Code vitiate the sale which it effected. In that case the party aggrieved by the irregularity must make his objection within 30 days from the date of sale; or if he does not do so, he is precluded by section 257 from any other remedy. But that section does not, we think, contemplate the case where a sale is pretended to be made by a Court which has no jurisdiction to make it at all.

Therefore, on the face of the judgment of Subordinate Judge, we think that his decision must be reversed.

At the same time, when we turn to the plaint, we find that it absolutely discloses no cause of action whatever, and certainly ought never to have been admitted by the Judge to whose Court it was presented. The date which it bears is 4th November 1872. But it would appear from an endorsement on its back that it was admitted and filed on the 21st December 1872. On that date, by the same endorsement, the 1st of February 1873 was fixed for the hearing. And on the 1st February 1873, according to the paper-book which we have before us, the written statement of the defendant was received and filed. The order made upon it is in these words: "On being laid before "the Court to-day, together with the exhibits, "it is ordered to be brought up with the "record. The 1st February 1873."

At that time the plaintiff had not filed a written statement. But on the 4th February 1873, a written statement was put in on behalf of the plaintiff, and it appears endorsed with this order: "To be brought up with the record. The 4th February 1873."

It is very plain that the proceedings in the Subordinate Judge's Court were exceedingly irregular. There is no proceeding between the parties on the 1st February, the day which had been previously fixed for the framing of the issues; and the written statement of the plaintiff was allowed to be filed without any reason assigned three d after the date fixed for the framing issues, and after the written statement of defendant had been filed.

But the most important matter for consideration now is the fact that at the t when the written statement of the defend was filed, there was nothing before the C which the defendant had to answer but plaint; and that plaint discloses no sor ground of action whatever. When written statement of the plaintiff was pu three days later, it might have been expe that something more in the shape of a c would have been made; and perhaps thi so. But even when we read this wri statement with our best consideration, a looking at the written statement of defendant, it is still exceedingly difficul make out what the parties in this suit fighting about.

Under these circumstances, and inasm as at present there has been no trial wh ever in the Court below, we think it ri while we reverse the decision of Subordinate Judge because we think erroneous, to direct that the plaint rejected.

We think that each party must bear th own costs in both Courts.

The 25th February 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morr *Judges.*

Execution—Interlocutory Order—Appeal—Jurisdiction.

In the Matter of

Soomut Doss, *Petitioner,*

versus

Bhoobun Lall, *Opposite Party.*

Moonshee Mahomed Yusuf for Petitioner.

Baboo Gopal Lall Mitter for Opposite Party.

A judgment-creditor having applied to the Small Cause Court under Act XI. of 1865, s. 22, obtained

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ficate that an *ex-parte* decree had been given, and satisfaction had not been obtained. This certificate ed in the Moonsiff's Court, and sought execution, the judgment-creditor pleaded limitation. The tion was rejected by the Moonsiff, from whose an appeal was preferred to the Judge, who revers- order, and declared the decree barred by limit-

LD that the decision of the Judge was *ultra vires*. LD (with reference to a decision of another Divi- Bench holding that the Court to which a decree is mitted for execution may entertain even a question tation) that it must be a question arising upon which come legitimately before the Court in course cution, and not a matter which might have been mined by the Court from which the decree is mitted.

ear, J.—THIS is a rule obtained by one nut Doss calling upon Bhoobun Lall and rs to show cause why an order made by Judge of Shahabad on appeal in the r of the execution of a decree, which nut Doss had obtained in the Small e Court of Arrah against Ramessur deceased, father of the respondents, ld not be set aside on the ground that s made without jurisdiction.

he principal facts of the case are as ows:—

he decree was given on the 11th July 4 for a sum of Rs. 104-10 annas. After ral intermediate proceedings, upon the ree-holders' application made on the 31st gust 1872, the Small Cause Court of ah, under the provisions of section 20, t XI. of 1865, granted him a certificate to following effect:—

"Certified that an *ex-parte* decree was iven for the plaintiff in the above case on he 11th July 1864, and that satisfaction of hat decree has not been obtained * * *."

The judgment-creditor, the present peti- ner before us, filed this certificate in the oonsiff's Court at Arrah, and sought exe- tion of the decree, when the judgment- btor appeared and raised the plea that the cree was barred by limitation. The Moon- ff, by his judgment and order, dated the th February 1873, held that the decree s not barred by limitation, and rejected e objection of the judgment-debtor. The igment-debtor preferred an appeal against e order of the Moonsiff to the Judge of hahabad, who, on the 31st March 1873, ersed the Moonsiff's order, and held that e decree was barred by limitation.

This last decision is the judgment which is now sought to be set aside.

The question, which has been raised in its broadest sense, is whether or not an appeal lay to the Judge from the order of the Moonsiff in the matter of this execution? It is admitted that the Judge of the Small Cause Court, before sending his certificate to the Moonsiff, had, on the report of his amlah, considered the question whether or not the execution was barred by lapse of time, and holding that it was not, had ordered execution to issue; and it is not disputed that this order, had it been made *inter partes*, would, by reason of section 21, Act XI. of 1865, have been final, and could not have been appealed against, if the execution had been proceeded with within the Moonsiff's jurisdiction. And it would be an extraordinary anomaly if by the mere removal of the decree to the Moonsiff's Court for the purpose of execution only, that a right of appeal which otherwise did not exist should spring up.

As to the question whether an appeal under circumstances such as those of this case will lie from the order of the Moonsiff to the Judge, a decision of the High Court, North-Western Provinces, has been cited. It is reported in 3 N.-W. P. Reports, page 168. And certainly it lays down without qualification that an appeal will lie. The grounds of the decision of the High Court are stated in the report concisely indeed, and we are not prepared at this moment to say whether we entirely concur in it or not. But the matter of appeal in that case which the Judge decided had reference solely to the interpretation of the decree: it had no similitude to the matter of appeal which the Judge has decided in the case before us. And abstaining from expressing any opinion whether or not the decision of the High Court is correct to its full extent, we think that the order of the Court, to which a decree has been transferred for the purpose of execution which is open to appeal, if any such order is open to appeal, must be an order made by the Moonsiff in the course of the actual execution of the decree which has been sent to him for execution.

In the present case, the Judge has entertained a question which did not arise in any way out of the Moonsiff's proceedings in the matter of executing the decree; it was a question between the parties actually existing if not determined before the copy decree was sent to the Moonsiff for execution. And

we think that the Judge had no power to take cognizance of and determine a question of that kind. It appears from the papers which are before us that the judgment-debtor was arrested on the 2nd October 1871 in execution of this decree, and brought before the Judge of the Small Cause Court; that on that occasion he said that he was not prepared to pay the decree, and asked for time. If the execution of the decree was ever barred by limitation at all, it must have been barred at that time, because three years had not elapsed between the date 2nd October 1871 and the date when this application for execution in the Moonsiff's Court was made. Therefore, the judgment-debtor ought, if he desired to avail himself of this objection, to have made it when he was on that occasion brought before the Small Cause Court. Had he made it, and had the Small Cause Court Judge come to a decision upon it, then that decision would not have been subject to appeal, and must have been treated by all Courts as final between the parties. And the fact that the judgment-debtor did not make the objection when he might and ought to have made it before the Court which could have decided it finally between him and the judgment-creditor, does not give authority to another Court to entertain it afterwards.

We think it right to add that it appears to us that the Judge's irregularity has been brought about by an irregularity on the part of the Small Cause Court itself. Even if the sections of Act VIII. applied to the case, neither the Judge nor the Moonsiff ought to have had before him, for the purpose of executing this decree, anything in the shape of a record other than a copy of the decree, and a copy of any order which the Small Cause Court Judge might have made authorizing the party to have execution, together with a certificate stating how much is due and unpaid upon the decree. Section 287, Act VIII. of 1859, directs that these should be sent from the Court which had made the decree to the Court which is to execute the decree, and nothing more. And it provides further that this copy decree shall "have the same effect as a decree or "order for execution made by such Court, "and may, if the Court be the principal "Civil Court of original jurisdiction in the "District, be executed by such Court, or "any Court subordinate thereto, to which it "may entrust the execution of the same."

So that if this section be applicable to the present case, the Court to which the decree was transmitted for execution ought not to have had any other papers or d ments than those before it. And if, more probably the case, Act XI. of 18 the enactment which is really operati this case, that Court would have had less before it. And it seems to be ciently apparent from these provision the Legislature that it never could have intended that the Courts to which a de or order has been transmitted for the pu of execution should take cognizance of matter which requires them to have at the record of the whole of the execu proceedings before them. And we may that section 290 of the Civil Proce Code seems to have been enacted by Legislature with the immediate intenti meeting the case of an objection being in the Court to which a decree is trans for the purpose of being executed, properly belonging to the Court from the decree came. That section says:—

"The Court to which such applicati "made may, upon good and sufficient "being shown, stay the execution of "decree for a reasonable time, to enable "defendant to apply to the Court by w "the decree was passed, or to any C "having appellate jurisdiction in respe "the decree or the execution thereof, "order to stay the execution, or for "other order relating to the decree or "execution thereof, which such Cou "first instance or Court of Appeal "have made, if execution had been issue "such Court of first instance, or if app "tion for execution had been made to "Court. * * *"

We by no means desire to say anyt which shall conflict with a decision Division Bench of this Court, holding the Court to which a decree is transm for execution may, under the provision the Civil Procedure Code, entertain ev question of limitation. But it must, apprehend, be a question of limitation ing upon facts which came legitimate the proceedings before the Moonsiff in course of his carrying out the executio the decree, and not a matter of limit which could have been heard and deter by the Court from which the decree is tr mitted for the purpose of execution. this view of the case, we think that decision of the Judge was *ultra vires*, must be set aside.

The rule, therefore, will be made abs with costs, which we assess at two mohurs.

The 25th February 1874.

Present:

Hon'ble J. B. Phear and G. G. Morris, *Judges.*

ate Arbitration Award—Procedure—Act VIII. of 1859, ss. 325 & 327.

Case No. 369 of 1873.

llaneous Appeal from an order passed the Officiating Judge of Bhaugulpore, ed the 10th November 1873, affirming order of the Subordinate Judge of t District, dated the 16th June 1873.

Saheb Ram Jha (Judgment-debtor), *Appellant,*

versus

ee Nath Jha and others (Decree-holders), *Respondents.*

Ameer Ali and *Moonshee Abdul Baree* for Appellant.

os Taruck Nath Sen and *Taruck Nath Paleet* for Respondents.

en a private award between parties is filed in a , the prescribed course is for the Court to give ent upon it and pass a decree; not to order ion before such decree has been passed.

Phear, J.—In this case the proceedings been so irregular that we find ourselves le to uphold the final decision of the r Appellate Court.

appears that one Doolee Jha and two persons, Kashee Nath Jha and Shaikh em Buksh, erroneously called in this case decree-holders, jointly made a claim st one Saheb Ram Jha. And after negotiations between them the matter he claim was referred to arbitration. arbitrators eventually made an award en these parties upon the footing of a promise which the parties themselves had e to, and which they asked the arbitrators to put into the shape of an award. This award was in these terms: "According to "the petition of compromise of both parties, "this suit be decreed in the manner follow- "ing:—That the defendant do give to the "plaintiffs, that is, to Doolee Chand, Kashee "Nath Jha, and Shaikh Kureem Buksh, a sum "of Company's Rupees 1,600 on account of "the value of the moveable and immoveable "properties set forth in the above petition, "and to Doolee Jha alone a piece of waste "land on the east of the pomegranate tree," and so on.

This award was made on the 20th December 1872. Afterwards Doolee Jha and his two co-plaintiffs applied to have effect given to the award under section 327, Act VIII. of 1859. This section runs as follows:—

"When any matter has been referred to "arbitration without the intervention of any "Court of Justice, and an award has been "made, any person interested in the award "may, within six months from the date of "the award, make application to the Court "having jurisdiction in the matter to which "the award relates, that the award may be "filed in Court. The Court shall direct "notice to be given to the parties to the "arbitration other than the applicant, requir- "ing such parties to show cause, within a "time to be specified, why the award should "not be filed. The application shall be "written on the stamp-paper required for "petitions to the Court, where a stamp is "required for petitions by any law for the "time being in force, and shall be numbered "and registered as a suit between the appli- "cant as plaintiff and the other parties as "defendants. If no sufficient cause be shown "against the award, the award shall be filed "and may be enforced as an award made "under the provisions of this chapter."

And the meaning of the last line is that the award when filed under an order of Court thus made, shall be in the same condition as an award made in the course of a suit under the previous provisions of the same chapter.

And in order to enforce an award made in a suit, the course of proceeding which must be pursued is that prescribed by section 325. That section runs as follows:—"If "the Court shall not see cause to remit the "award or any of the matters referred to "arbitration for re-consideration in manner "aforesaid, and if no application shall have "been made to set aside the award, or if the "Court shall have refused such application, "the Court shall proceed to pass judgment

"according to the award, or according to its "own opinion on the special case if the "award shall have been submitted to it in "the form of a special case; and upon the "judgment which shall be so given decree "shall follow, and shall be carried into exe- "cution in the same manner as other decrees "of the Court. In every case in which "judgment shall be given according to the "award, the judgment shall be final."

This course, then, which is prescribed for enforcing an award made under the directions of the Court, ought to have been followed in the present case for the purpose of enforcing the private award between the parties filed under section 327. That is, the Court ought to have given judgment upon it, passed a decree, and then that decree would have been enforcible in the same way as the ordinary decrees of Court are always capable of being enforced.

Instead, however, of passing a judgment on the footing of the award and making a decree accordingly, the Court to which the application was made passed the following order:—

"Upon the hearing of this case to-day be- "fore Moulvie Syud Mahomed Wahidudeen "Khan Bahadoor, 1st Subordinate Judge of "Bhaugulpore, in the presence of Baboos "Lullit Narain Singh and Chunderdhur Per- "shad, Pleaders for the plaintiffs, as also "Baboo Jadu Nath Sircar and Baboo Gopal "Chunder Sircar, Pleaders for Doolee Jha, the "vendor, one of the plaintiffs, and of Moulvie "Moheooddeen, Pleader for the defendant, "the documentary and oral evidence adduced "by the pleaders on both sides was perused "and heard. After carefully weighing and "considering the contentions of the pleaders "for both parties, the Court does hereby "order that this execution-case be filed in the "office with the following directions—that "Kashee Jha and others, the remaining three "plaintiffs in the arbitration case, do proceed "with execution against Saheb Ram Jha in "respect of the remaining half, *viz.*, Rs. 800, "with costs."

Clearly this does not conform to the provisions of the Civil Procedure Code. It is an order that two out of three plaintiffs should "proceed with execution" against the defendant at a time when there was no decree to be executed. It was the duty of the Court, as has been already pointed out, first to pass a decree in terms of the award, if it thought that such a decree should be passed at all; and then to leave the parties to make an application for the execution of that de in the ordinary way.

Against this order permitting the pa to proceed to execution, an appeal was ferred to the Judge; and the Judge dismi it. And this order of the Judge dismi the appeal is that which is now before u special appeal.

It seems to us that it cannot be suppo because there is not a proper ground in upon which it can stand. There cann an order for execution of the decree there has been a decree passed. And plain in this case that the irregularity o proceedings has led to possibly inacc results, for the Judge says:—"One D "Jha had a claim against the present a "lant Saheb Ram. He sold half his r "and interests in it to the present plai

"The case was referred to arbitration "the award duly filed under section "Act VIII. of 1859.

"Doolee certified that the judgment-d "Saheb Ram had satisfied the whole dec

Now this is manifestly incorrect, bec there was never a decree; and what S Ram had in fact done was to oppose the of the award under section 327, on ground that the award had already been plied with and satisfied by the defen This is something different from a de holder certifying to the Court under provisions of Act VIII. of 1859 that decree made in his favour has been sati The Judge goes on to say:—

"The other persons who shared the d "with Doolee on this objected, and "directed to execute their portion of "decree.

"Against this order no appeal was "ferred, but when the execution proceed "were taken against the judgment-debtor "plea of payment was raised. This "being disallowed, the present appeal "been filed.

"It appears to me that the judgment-de "having paid the decree money into C "cannot be protected by the certificat "one decree-holder from the demands o "co-decree-holders."

Now, inasmuch as there has been no de of Court, there could not be any pay into Court by the judgment-debtor; and order that some of the decree-holders sho execute a fraction of a decree would h been bad in itself even had a decree exis

Supposing for the moment that the Sub dinate Judge had made a proper decree w the application was preferred to his C

d

er section 327, then it would have been n to the present appellants, if they could nduce their co-decree-holder, Doolee Jha, oin with them, to apply alone to the rt under the provisions of section 207 of Civil Procedure Code, asking to be allowed execute the decree notwithstanding the joinder of Doolee Jha, subject, of course, ch order as the Court might think neces- for the purpose of preserving the inter- of Doolee Jha. Upon such an appli- on being made, the judgment-debtor would an opportunity of coming in and show- under what circumstances, if any, his ment of the amount decreed had been e to Doolee Jha; and Doolee Jha him- would be able to oppose the claim of his laintiffs to be allowed to obtain execution he decree without his being joined with m. And in this way the whole matter, ch was apparently decided by the Court w without any complete hearing thereof, ld come on to be determined fully and factorily in the presence of all the parties cerned. We think that this course must be pursued. It is possible that the r which has been made is in effect a t order; that is, if the proceeding had n entirely regular, the present respondents ht possibly have satisfied the Court that ought to be allowed to execute the ree against the judgment-debtor to the nt of Rs. 800.

ut however this may be, we think, for the ons already mentioned, the present order not be allowed to stand. Accordingly, reverse the decisions of both the lower urts, and we direct that the Subordinate dge do pass a decree according to the terms he award.

t seems to us from the findings of fact ich have been expressed by the Subordinate dge that the opposition to the filing of the ard and to the passing of the decree cording to its terms, did in the judgment of Court fail, and that consequently the pre- so-called decree-holders were entitled have a decree made in terms of the award, t is, a decree to the effect that Saheb Ram d others should pay to Doolee Jha, Kashee h Jha, and Kureem Buksh a sum of Rs. oo. When that decree is made, the proper ceedings to enforce it may be taken by the sent respondents.

We think that the appellant here is entitled be paid his costs, and that in the Courts low each party should bear their own costs. We allow one gold mohur for pleader's fees

The 4th March 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, *Judge.*

Recorder—License—Act VII. of 1872, s. 58—Contract contrary to Public Policy.

In the Matter of

Moung Htoon Oung, an Advocate of the Recorder's Court at Rangoon, *Petitioner.*

Mr. J. P. Kennedy for Petitioner.

In a case in which an Advocate of the Recorder's Court at Rangoon was suspended by the Recorder under Act VII. of 1872, s. 58, for having entered into a contract which was contrary to public policy, the High Court though reprobating such a practice as improper and mischievous, yet considered that a serious warning was all that was called for under the circumstances, inasmuch as it appeared that the Advocate in this instance did that which was done by other Advocates, even by persons to whom he might fairly look for an example.

Couch, C.J.—THE law by virtue of which the applicant in this case has been suspended by the Recorder of Rangoon is contained in section 58 of Act VII. of 1872, which provides that the Recorder may for any sufficient reason suspend or withdraw any license granted under that section. It may be that the agreement which the applicant, an Advocate in the Recorder's Court, had entered into with the plaintiff in the suit would be void as contrary to public policy, and the plaintiff would be able, by an application to the Court, if the money recovered in the suit should be paid into Court, to prevent the Advocate from receiving the share which it was agreed he should have; or if the money should be paid to the Advocate, the plaintiff might require him to pay over the whole of it to her; and if he did not, might bring a suit against him for it, in which he would be unable to set up the agreement that he was to have a share. But the question to be considered now is not whether the agreement, which it is admitted was made, is contrary to public policy, and therefore void; but whether, looking at all the circumstances of the case, it can be said that the entering into such an agreement by the Advocate is a sufficient reason for suspending his license.

It appears from the judgment of the

Recorder that the applicant in this instance did that which was done by other Advocates in the Recorder's Court. Whether it be correct to say that they all did so or not, it is, I think, clear from the statement of the Government Advocate that it must have been done by persons to whom the applicant might fairly look for an example. And he might suppose that he was not doing anything illegal or that would disqualify him from being an Advocate, when he found that they were doing the same.

Of the impropriety of such a practice there can be no doubt. If allowed it may produce various mischiefs; and though there may possibly be cases in which an Advocate, from the circumstances of the plaintiff, might be allowed to make some arrangement of this kind, they are so few, and so easily confounded with cases in which he ought not to do anything of the kind, that it is not fit or proper for the Courts to allow a transaction of such a nature to be entered into by Advocates practising in them.

The Judicial Committee of the Privy Council have shown, by the notice which they have recently issued, the view which the highest Court for India takes of such transactions. They are all to be very much reprobated and ought not to be allowed. But in considering whether in the present case there is a sufficient reason for suspending the Advocate, as he has been by the Recorder, we must look at all the circumstances. It appears to me that this was not a case in which he ought to have been punished with the suspension that has been ordered. It was a very fit case in which he should receive a serious warning from the Court, and be made to know that if he did such a thing again he might and would be suspended from practising; but I think this was all that his conduct under the circumstances called for. Therefore I am of opinion that the sentence of suspension should be reversed; but I desire it to be understood that in doing this the Court does not in the slightest degree allow that practices of this kind will not be visited with fit punishment when they are brought to its notice.

Jackson, J.—I entirely concur. Any other practitioner, or this same practitioner, in the Court of the Recorder, who shall be found to have committed a similar act after this warning, will not, of course, have the same claim to indulgence which the present petitioner has been able to urge.

The 4th March 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Suit against Minor—Costs—Liability of Guardian.

Case No. 363 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Dacca, dated the 29th July 1873.

Komul Chunder Sen and another (Decree-holders), *Appellants*,

versus

Surbessur Doss Goopto (Judgment-debtor), *Respondent.*

Baboo Nullit Chunder Sen for Appellants.

Baboo Bipro Doss Mookerjee for Respondent.

In a suit against a minor, if the Court considers that the guardian should be personally ordered to pay the costs, it should be so stated in the decree or order. Where the guardian is simply declared liable for the as the defendant in the case, the liability must be taken to refer to him as the representative of the minor and representing his estate.

Couch, C.J.—In this case the suit was defended by Surbessur Doss Goopto as guardian of the minor. We do not think it is material whether in the title of the suit the name of the guardian comes first, and he is described as the guardian of the minor, or whether, as would be more correct, the minor by his guardian is called the defendant. When the suit is against a minor if the Court considers that there are circumstances connected with the defence which make it proper that the guardian should be personally ordered to pay the costs, it should be so stated in the decree or order of the Court. Here it is not so stated. A common and rather vague expression is used, and it is ordered that the costs shall be paid by the defendant Surbessur. That means, we think, as the representative of the minor and representing his estate. The substance is that the costs are to be paid out of the estate of the minor on whose behalf he defended the suit. We do not think we ought to read it as an order that the guardian was to be personally liable for these costs. The Judge has taken a proper view of the decree, and the appeal must be dismissed. Many of

se decrees are drawn up in a loose way, l we must not look so much at the words d as what, from the nature of the case, pears to be the intention of the Court. ere is nothing in this case to show that guardian was intended to be made per-ally liable for the costs.

The 4th March 1874.

Present:

e Hon'ble Sir Richard Couch, *Kt.*, *Chief stice*, and the Hon'ble W. Ainslie, *Judge*.

Decree for Costs—Alternative Remedy.

Case No. 352 of 1873.

iscellaneous Appeal from an order passed by the Judicial Commissioner performing the duties of the Recorder of Rangoon, dated the 24th July 1873.

jim Nullah Moodeen (Judgment-debtor), *Appellant*,

versus

. G. Cruickshank, Agent of the Bank of Bengal at Rangoon (Decree-holder), *Respondent*.

Mr. R. E. Twidale for Appellant.

The Advocate-General for Respondent.

Where a decree, after awarding costs, went on to provide for the redemption of the mortgaged property in dispute, or, on mortgagor's failure to pay, for its sale and for the costs being added to the mortgage-debt as a charge on the property:

HELD that the latter provision was an alternative remedy which did not deprive the decree-holder of the right which the first part of the decree gave him of executing the order for costs in the same manner as any other money-decree.

Couch, C.J.—THE Bank of Bengal applied for execution of the decree of the 25th of August 1871 so far as it awarded costs, and ordered costs amounting to Rs. 296 to be paid. In the application an offer was made to deduct from the Rs. 296-8, Rs. 209-8, to which the defendant, against whom the execution was applied for, was entitled. The Recorder has ordered the execution not to be issued for the sum which the Bank offered to set off against the decree for costs.

It is now objected that this could not be done, as the decree obtained by the Bank of Bengal was for realizing the sum due upon the mortgage, and that the costs were to be paid by the sale of the mortgaged property upon the mortgagor failing to pay the principal sum and interest and costs at the time appointed. But the decree, a copy of which has been produced by Mr. Twidale, begins by ordering that "the appeal be dismissed, and "the appellant pay to the respondent, the "Bank of Bengal, the sum of two hundred "and ninety-six rupees, being the amount of "costs incurred by him (meaning the Bank) "in this Court." Here is an express order that the appellant shall pay the costs, which may be enforced as a decree for the payment of money. It is true the decree goes on to provide in the usual way for the redemption of the mortgaged property, if the mortgagor thinks fit to redeem it, and, if he fails to pay what is due upon the mortgage for the sale of the property, and directs that the costs shall be added to the principal and interest, so that they would be a charge upon it, and gives to the mortgagee, the plaintiff in the suit, the power of realizing the costs as well as the principal and interest out of the mortgaged property. But this must not be considered as depriving him of the right which the first part of the decree gives of executing the order for costs in the same manner as any other decree for the payment of money. It was an additional remedy, or, as he might adopt it if he thought fit, it may be called an alternative one. He was not bound to resort only to that mode of obtaining his costs; and it would not be fit that the Bank should be obliged to do so when there was a decree which might be set off *pro tanto* against the costs. The consequence of this would be that the Bank would have been obliged to pay to the party the Rs. 209, and be unable for a considerable time, until the mortgaged property was sold, to recover the costs which it was declared by the High Court to be entitled to. The decision of the Recorder is right, and the appeal must be dismissed.

The 4th March 1874.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Suit against Co-partners—Partnership Accounts.

Case No. 905 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 6th February 1873, modifying a decision of the Additional Moonsiff of that District, dated the 2nd March 1872.

Kalee Churn Sahoo (one of the Defendants), *Appellant,*

versus

Ram Lall Sahoo (Plaintiff), *Respondent.*

Baboos Kalee Kishen Sen and *Gunesh Chunder Chunder* for Appellant.

Mr. M. L. Sandel and *Baboo Mohendro Lall Mitter* for Respondent.

In a suit against co-partners in a joint firm to recover money deposited as plaintiff's share, and to have accounts rendered of the profits, before any order can be made to the effect that plaintiff is entitled to be paid, by any one of his partners or out of the assets of the firm, the actual money advanced, the whole accounts of the firm ought to be taken, and the ultimate liability of each of the partners ascertained.

Phear, J.—We have had the plaint in this suit translated, and also the written statements of the several defendants, and we find that they are pretty accurately abstracted in the judgment of the Moonsiff. The Moonsiff says :—

"The plaintiff brings this suit to recover "Rs. 428-9½ principal with interest of "money deposited, and to have accounts "rendered of the profits of a joint firm "carrying on business in grains, situate in "Sudder Bazar, Camp Dinapore, and of "profits on hoondees; and, in case the "accounts are not rendered, to recover "Rs. 137-3 estimated profits of the said "business, in right of co-partnership against "Kalee Churn and Gunesh Sahoo, principal "defendants, jointly with other co-partners, "*pro-formâ* defendants, on these allegations; "that the business was commenced from the "11th Joit Buddee Sumbut 1927 under the "joint partnership of all the defendants, and "carried on up to the 8th Bysack Buddee "1928 Sumbut, under the exclusive mana "ment of the defendants Nos. 1 and 2; t "the total amount of profits being represe "by six seers six kanwahs, it was ag "that the plaintiff should get 14 kanw "as his share, and the defendants "remainder as their shares, as per sched "given below the plaint; that the plai "paid the sum of Rs. 200 without inte "in lieu of his labour, and another sum "Rs. 200 on interest—in all Rs. 400 c "tal—to the defendants Nos. 1 and 2; "that now the defendants neither pay "money in suit, nor render any accounts "the profits.

"The defendant No. 1, Kalee Ch "replies that the account-books of the "are with Gunesh, plaintiff, Soodeen "others, defendants; that the money w "which the business was carried on was "charge of Gunesh Sahoo, Gunshee, "Soodeen; that plaintiff was a co-part "under Gunshee Sahoo and other defenda "that they are liable to him; and that "statement that the management of "business was in his (defendant's) hands "false.

"Gunesh Sahoo, defendant No. 2, st "that Kalee Churn was the manager of "business; that nothing is due from him "the plaintiff; that, on the contrary, a cert "sum is due to him, plaintiff, and other d "fendants from Kalee Churn.

"Mohadeo Sahoo, the *pro-formâ* defenda "states in reply that the books of the busin "were not kept with the defendant No. "and that, on the contrary, the manageme "of the business was in the hands of t "plaintiff and Gunesh Sahoo. Guns "Sahoo, Bhunuk, Radha Kishen, Ram D "Lall, and Soodeen, defendants, state that t "business was carried on under the manag "ment of Kalee Churn.

"Accordingly," the Moonsiff says, "t "points for determination as arising from t "contentions of both parties are as follow :-

"*1st.*—Whether or not plaintiff has p "any capital, if so, to whom, and from who "is he entitled to recover it?

"*2nd.*—With whom are the books of t "business left; under whose management w "the business of the firm carried on, a "which defendant is liable to rend "accounts?

"*3rd.*—In case the accounts are not ren "dered, whether or not plaintiff can recover "the estimated amount of profits claime "by him?"

The Moonsiff, after discussing the evidenc

h

he case, makes a decree to this effect: hat the plaintiff do realize from the incipal defendants the amount, principal the capital in dispute, with interest; that do get an account of the profits from e defendant Kalee Churn according to e account-books; that he do recover the ount of profits which may, as per count, fall to his share from the above-med Kalee Churn and Gunesh; that the ts with interest be charged to the fendants; and that the costs of the *pro-rmâ* defendants be charged to the defend-t No. 1, Kalee Churn."

Kalee Churn preferred an appeal to the er Appellate Court against this judg-t. And on this appeal the Judge made e alteration in the decree. He reversed part of the lower Court's order which cted Kalee Churn to furnish accounts; he also made Gunesh liable to pay the *-formâ* defendants' costs.

ow it seems to us very clear that both Courts have taken an erroneous view of nature of this suit. It appears from a parison of the plaint and the written ements, that the partnership between the intiff and all the defendants alleged by plaintiff is admitted; and, on the facts ch are disclosed by the parties themselves, e can be no doubt that the plaintiff was itled to have an account taken of the tnership-business. But, as a partner, he ld not be entitled to recover a specific n of money advanced by him to the tnership from either all the other partners ntly, or from any one of them severally, til the partnership-accounts had been en, and the extent of his own liability der the partnership was ascertained. It ght be quite possible that his liability as a tner even to contribute to the repayment advances made by the other partners ght exceed in amount the sum of money ch he on his part was entitled to recover a creditor of the firm. And again, he ntly with the other partners might be der liabilities to pay strangers, creditors of e firm, a much larger sum of money than e assets of the partnership could meet; and e share of this debt might be greater than e sum of money which he was entitled to im out of the funds of the firm. In other rds, before any order could be made to the ect that the plaintiff was entitled to be id by any one of his partners or out of assets of the firm, the actual items of oney which he advanced to the firm the ide accounts of the firm ought to be taken, and the ultimate liability of each one of the partners ascertained. We think, therefore, that the judgments of both the lower Courts must be reversed. And as the case has not been fully tried out in the first Court, we think it necessary to direct that the case should be sent back to the first Court in order that the trial may be there completed. And we think it expedient that detailed directions should be given to the Moonsiff in order that the inquiry and investigation and the taking of the accounts, which must be effected by him, may take place in the most satisfactory manner.

Our order, therefore, will be to the following effect: That the decrees of the Lower Appellate Court and of the Moonsiff's Court respectively be reversed, and the case be remanded to the Lower Appellate Court; and the Lower Appellate Court will be directed to return the record to the Moonsiff's Court in order that the trial and investigation of the case may be there resumed and continued to completion And the Moonsiff will also be directed to effect the investigation by taking the following accounts, that is to say:—

1st.—An account of the partnership-dealings and transactions between the plaintiff and the defendants respectively since the commencement of Jeit, dark side of the moon, in the year 1927 Sumbut.

2nd.—An account of the moneys due to the partnership.

3rd.—An account of the debts due from, and the liabilities of, the partnership.

4th.—An account of the partnership-property, if any, which remains undisposed of.

5th.—An account of all moneys which have been paid or contributed by the plaintiffs and defendants respectively into the partnership-funds.

6th.—An account of all moneys which the plaintiff and the defendants respectively have drawn from the partnership.

And, in taking the above-mentioned accounts, all parties will be at liberty to adduce before the Moonsiff such new and additional evidence as they may be advised, and books of account proved to have been duly kept in the course of the partnership-business will be received as *primâ-facie* evidence. And we further direct that, when the above-mentioned accounts shall have been taken, the Moonsiff shall, upon the footing and according to the results thereof, determine the rights of the plaintiff and the defendants respectively, and the costs to be paid by them, inclusive of the costs already incurred in this Court and in the Lower Appellate Court.

The 5th March 1874.

Present :

The Hon'ble F. B. Kemp, *Judge.*

Rent-suit—Special Appeal—Act VIII. (B. C.) of 1869, s. 102.

Case No. 943 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Sarun, dated the 10th April 1873, affirming a decision of the Sudder Moonsiff of that District, dated the 28th December 1872.

Gopal Suran Narain Singh (one of the Defendants), *Appellant,*

versus

Ram Tuhul Rawut (Plaintiff) and another (Defendant), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Mr. R. E. Twidale for Respondents.

In a suit for rent of land, which plaintiff claimed to have purchased by a deed of absolute sale, defendant urged that he was the beneficial owner, and that plaintiff's vendor was his (defendant's) benameedar. The first Court, finding that neither plaintiff nor his vendor had been in possession, dismissed the case. The Lower Appellate Court remanded it for re-trial :

HELD that, as the Judge's decision did not determine any title to, or interest in, land, as between parties having conflicting claims thereto, and as the amount sued for did not exceed Rs. 100, no special appeal would lie under Act VIII. (B. C.) of 1869, s. 102.

THIS was a suit for rent. The plaintiff claims to have purchased a moiety of the share of Ram Chunder Pandey by a deed of absolute sale dated the 12th of June 1872. The defendant in the suit is Gopal Suran Narain, who stated that Sheo Pershad Pandey was his benameedar. The first Court raised the issue whether the plaintiff is in possession of the property purchased by him; and, if not, then is the plaintiff entitled to the arrear of rent without determination of right? The Moonsiff, after giving his opinion that Gopal Suran Narain was the beneficial owner, and that the plaintiff's vendor was a mere furzee, proceeded to state that in his opinion the plaintiff has not been able to show either that his vendor or the plaintiff himself had been in possession. He therefore dismissed the plaintiff's suit.

The Judge has reversed the decision of the Moonsiff, and has remanded the case to the Moonsiff for re-trial. The Judge takes objection first to the admission of the intervenor in the suit, and he is of opinion that the Moonsiff ought to have tried the suit between the plaintiff claiming the rent and the defendant, the tenant; and he therefore sends back the case for the Moonsiff to try who was in possession and receipt of the rent prior to suit. I do not find, although the Judge finds fault with the Moonsiff for admitting the third party as an intervenor that he directs his name to be removed from the record; on the contrary, it would be impossible for the Moonsiff to try the issue laid down by the Judge, namely, who was in possession and receipt of the rent, without keeping the intervenor on the record.

In special appeal three main grounds are taken: *1st*, that the Lower Appellate Court as well as the first Court ought to have tried the questions on the merits, and the pleader, who has been heard for the special appellant, has explained that the meaning of that ground is that the Lower Court ought to have tried the question of right to receive the rent. The *2nd* ground is that the Judge ought not to have remanded the case, but ought to have tried the issue as laid down by the first Court which covered the whole of the merits of the case, namely who was in possession and receipt of rent; and the last ground is that the Judge was wrong in saying that the first Court ought not to have made Gopal Suran a defendant in the case.

Then there is a preliminary point taken by the pleader for the respondent that no appeal will not lie under the provisions of section 102 of Act VIII. of 1869 (B. C.) inasmuch as no question of right to enhance or vary the rent of a ryot or tenant, or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, has been determined by the judgment. Mr. Twidale, who appears for the respondent, admitted that, as the Court were against him on this preliminary objection, he had no objection to the case being tried by the Judge instead of being tried by the Moonsiff on the issue laid down by the Judge, namely, who was in possession and receipt of rent; but, in my opinion, the preliminary objection is fatal to the hearing of this appeal. The Judge's decision does not determine any question relating to a title to land, and therefore, under section 102 of Act VIII. (B. C.) of 1869, it is clear that the amount sued for not exceeding Rs. 100, and no question of title to land or of some interest in land as between parties having conflicting claims thereto having been determined, no special appeal will lie; and

fore, without going into the other ion raised in special appeal, and in , in so far as the admission of the inter- on the record, I should feel disposed to with the first Court, the special appeal missed with costs.

The 6th March 1874.

Present:

Hon'ble Sir Richard Couch, *Kt.*, *Chief stice*, and the Hon'ble C. Pontifex, *dge.*

diction—Cause of Action—Defendant—Appeal—Letters Patent, cl. 11.

als from orders passed by the Hon'ble G. Macpherson, exercising the Ordi- y Original Civil Jurisdiction of the gh Court.

ee Ismael Hadjee Hubeeb (one of the Defendants), *Appellant*,

versus

ee Mahomed Hadjee Joosub (Plaintiff), *Respondent*,

and

ma Bye, Jan Mahomed Hadjee Joosub, d Hazira Bye (three of the Defendants), *ppellants*,

versus

jee Mahomed Hadjee Joosub (Plaintiff), *Respondent.*

Ingram and *Mr. Evans* for the Appellants in both cases.

Mr. Kennedy for the Respondent.

s was a suit to set aside a release alleged to have executed in Calcutta under fraudulent representa- made by the first defendant, and for an account and istration of the estate of a deceased Mahomedan ied intestate in Bombay, where he left moveable immoveable property. Leave was granted to te the suit in the High Court subject to objection e defendants. Some of the defendants who were nts of Bombay not having appeared, the Court d to allow the plaint to be taken off the file on the tion of the first defendant who was subject to its iction:

LD, on appeal, that the cause of action included the of the release upon the plaintiff's share of the rty, which was in Bombay, and that the suit came that part of cl. 11 of the High Court's Charter 65 which provided that the leave of the Court be obtained:

LD that the proper place for taking the account for would be where the property was situated, s regards a cause of action for not accounting it well be said to arise in Bombay:

LD that the dwelling or carrying on business necessary to give the Court jurisdiction under the clause must be of all the defendants; the expression "defendant" being used, not as indicating an individual defendant in a suit, but the party defendant to the suit, which may be one person or several.

An order under the clause 11 of the Charter is an appealable order.

THIS was a suit to set aside a release, and for an account and administration of the estate of a deceased Mahomedan who died intestate in Bombay. The plaint stated that the estate of the deceased, so far as the plaintiff could ascertain it, consisted of four houses in Bombay, including the family dwelling-house, of the aggregate value of two lakhs and Rs. 45,000; of a half share of a property also situated in Bombay worth Rs. 10,000; one share in the Appollah Press Company valued at Rs. 1,25,000; one lakh of rupees in cash; jewellery worth from Rs. 50,000 to Rs. 60,000, and household property worth Rs. 50,000.

The plaintiff alleged and charged that the release sought to be set aside was executed by him under fraudulent representations made by the 1st defendant; that the release was executed in Calcutta; that that 1st defendant had for several years past carried on, and was, at the time of the institution of the plaint, still carrying on, business in Calcutta; and that the three other defendants were "all of Miruon Mollah in Bombay."

On the 17th September, Macpherson, J., granted leave to the plaintiff to institute the suit in this Court, subject to any objection which may be made thereto by the defendants. The 1st defendant in the first instance, and subsequently the other defendants, applied to have the plaint taken off the file, but both applications were rejected. The judgment of Macpherson, J., on the application of the 1st defendant, was as follows:—

It is unnecessary to say what I should have done had the other defendants, those who are not personally liable to the jurisdiction of this Court, appeared here to-day. But I cannot order the plaint to be taken off the file now, when the only person who appears to object to the case being tried here is one who is personally liable to the jurisdiction of this Court. There are two distinct grounds of jurisdiction in the matter. The first, which is applicable to all the defendants, is that a very substantial part of the cause of action (to wit the execution, &c., of the release) arose within the local jurisdiction of this Court. The second is that the defendant, who now objects to the suit being entertained here, carries on business in Calcutta by his gomashta, and is therefore

personally subject to the jurisdiction of the Court. As the other defendants do not object to the suit being instituted here, I do not see how I can order the plaint to be taken off the file, merely because a defendant, who is undoubtedly subject to the jurisdiction, objects to being sued here.

I express no opinion as to how much of the relief sought in the plaint will be obtainable in this suit, even if the plaintiff proves his case. The application is refused, but the costs will be costs in the cause.

On the application of the other defendants, Macpherson, J., intimated that he would not order the plaint to be taken off the file, as the case would have to go on against the 1st defendant. The Court, however, said that provision ought to be made for any extra costs to which these defendants might be put by reason of the suit proceeding here instead of at Bombay, and suggested whether an application might not be made to stay the case pending security being given for these extra costs.

The 1st defendant appealed from the order as against him on the following grounds:—

For that, by the said order, leave was granted to the plaintiff to institute the suit in this Hon'ble Court, whereas such leave ought not to have been granted.

For that the suit is a suit for land, no part of which is situate within the jurisdiction of this Hon'ble Court, as by the plaint appears.

For that the learned Judge, having found (as plainly appeared in the plaint and affidavits) that the balance of convenience was entirely in favour of having the suit tried in Bombay, erroneously exercised his discretion in giving leave to the plaintiff to institute the suit in this Hon'ble Court.

For that the order so erroneously made is a final order wrongly creating jurisdiction in this matter against this defendant.

For that the learned Judge erroneously held that he was bound to make such order final against the defendant, although the other defendants were out of the jurisdiction, and the cause of action did not arise wholly within the jurisdiction, and the balance of convenience was against making such order, on the ground that this defendant carried on business by a gomashta in Calcutta.

The other defendants appealed on grounds which were as follow:—

For that the learned Judge ought not to have granted leave to the plaintiff to institute this suit in this Hon'ble Co whereas he did so grant it.

For that the learned Judge, a stating that he was fully satisfied that suit could not be conveniently tried this Hon'ble Court, and that its being tried would be a great hardship to t defendants, and that the balance of co nience clearly required that it should tried in Bombay, yet held that he was obl to allow the suit to be tried in Hon'ble Court, because the defendant Ha Ismael Hadjee Hubeeb carries on busine Calcutta, whereas he ought not to hav held.

For that the learned Judge ought have refused or withdrawn the said le whereas he did not do so.

For that the learned Judge ha stated that the defendants had made strongest possible case against having suit tried in Calcutta, and having discre to prevent its being so tried, refused to e cise that discretion.

For that the learned Judge ought have held that this suit was a suit for out of the jurisdiction of, and therefore cognizable by, this Hon'ble Court, where did not so hold.

For that the learned Judge ought have taken the plaint off the file, where did not do so.

The judgment of the Appellate Bench was delivered as follows by—

Couch, C.J.—This was a suit brough the respondent against Hadjee Ismael Ha Hubeeb, the appellant in one appeal, three other persons who are the appell in the other. The plaint stated that Hadjee Joosub Baladina, a Mahomedan, at Bombay intestate, leaving consider moveable and immoveable property, leaving him surviving his widow, the defen Rohima Bye, and three sons, Hadjee Da Hadjee Joosub, since deceased, the plai Hadjee Mahomed Hadjee Joosub, and defendant Jan Mahomed Hadjee Joosub, also a daughter, the defendant Hazira his only heirs and next-of-kin. It stated that release was executed by plaintiff, and that the execution of it had b obtained by fraudulent representation on part of the first defendant Hadjee Ism Hadjee Hubeeb, and the prayer was that release, which was dated 22nd October 18 might be declared fraudulent and void, that the same might be brought into Court to be cancelled; that it might declared that the inventory and accou

d

h had been filed by the plaintiff in the
t at Bombay were not binding upon
and that the same should be set aside;
that an account might be taken of the
ty of Hadjee Joosub Baladina come
hands of the defendant Hadjee Ismael
ee Hubeeb, or of any other person or
ns by his order or for his use; and that
eiver might be appointed to get in the
ty and the rents and profits thereof,
that the same might be secured for the
it of the persons entitled thereto.
the 17th of September 1873, upon an
cation by Mr. Kennedy as Counsel for
laintiff, it was ordered that the plaintiff
d be at liberty, subject to any objection
might be made thereto by the
dants, to institute a suit in this Court
st the four defendants who are named in
der; to have a certain release of 22nd of
ber 1870 cancelled; to have it declared
he inventory and account-current filed
e plaintiff in the High Court of Bombay
not binding upon him; and for an account
for the appointment of a Receiver—all
bjects of the plaint stated in the prayer
mentioned in this order.
e first defendant made an application,
ccordance with the reservation in the
, that the plaint might be taken off the
which was refused by Mr. Justice
herson on the 8th of December. Pro-
, in consequence of some thing which
om the learned Judge on that occasion,
hree other defendants on the 16th of
mber served notice of an application on
part to take the plaint off the file, which
cation was refused on the 5th January
The appeals are from these orders.
w, in considering what conclusion we
to come to in these appeals, we must
at the case as a whole. Mr. Kennedy,
appeared for the respondent, intimated
if he were not allowed to take any
course, he would be glad to have the
reated as a suit against the first defend-
set aside the release. But that cannot
llowed, because merely to set aside the
se in a suit against the first defendant
d leave all the material questions to be
ed in another suit. The real object of
it is that an account may be taken of the
ty left by the deceased, and the share
e plaintiff ascertained, and provision
for his receiving it. The 1st defend-
might fairly claim that the other three
ns, who are interested in the property,
who would be entitled to be heard as to
mount of the plaintiff's share, and to be
present at the taking of the accounts, should be parties to the suit. The plaintiff cannot be allowed, when the case comes here on an appeal from the order of Mr. Justice Macpherson, to say that he would prefer to put his suit in another form. He filed his plaint against the four defendants, and prayed for relief against all, and in the order by which he was at liberty to bring his suit in this Court, the object of it was expressly stated. We must, therefore, treat it as a suit which has been brought against all four defendants, and properly brought against them.

The decision of this case depends upon the construction which is to be put on the 11th clause of the Charter of the High Court of 1865. It provides that in the case of suits for land or immoveable property, the High Court shall have jurisdiction when the land or property is situated within the limits of the ordinary original jurisdiction of the Court; and in all other cases, if the cause of action shall have arisen either wholly, and in case the leave of the Court shall have been first obtained, in part, within such limits, or if the defendants, at the time of the commencement of the suit, shall dwell or carry on business, or personally work for gain within them.

Here the cause of action cannot be said to have arisen wholly in Calcutta. We do not propose to enter into what might be a difficult discussion of the various decisions as to the meaning of cause of action. The conflict of decisions in the Courts in England appears still to continue, for in one of the latest cases on the subject—Durham *vs.* Spence, L. R., 6 Ex. 46—the learned Judges were divided in opinion; there the cause of action, whatever may be the true meaning of the expression, cannot be said to have arisen wholly in Calcutta. The fraudulent representations which led to the execution of the release may have been made, and the release may have been executed here; but the cause of action in this case consists of more than that. It includes the effect of the release upon the plaintiff's share of the property; if there had been no property, the execution of the release would not have injured the plaintiff in any way. In order to constitute a cause of action, there must be an injury to him from the operation of the release. Then where did the release take effect? Where was it operative? The property was in Bombay. It might be said that, as regards the moveable property, the plaintiff's share of it would follow him, and if he dwelt in Calcutta, the moveable property to which he was entitled

would be there. It would, perhaps, be a somewhat far-fetched application of the doctrine to hold that the release operated in Calcutta in regard to the plaintiff's share of the moveable property. It certainly could not do so in regard to the share in the immoveable property, which apparently formed the greater portion of what the plaintiff claimed to be entitled to. That was in Bombay, and that part of the cause of action arose there. In such a case as the present, I think the cause of action in respect of the immoveable property arose in the place where the release took effect, and the suit comes within that part of the clause which provides that the leave of the Court must be obtained. I shall speak presently of the other part of it which gives jurisdiction in the case of the defendant dwelling or carrying on business within the limits of the ordinary original jurisdiction.

Again, the suit asks for an account to be taken. The proper place for taking the account would certainly be where the property is situated, and, as regards a cause of action for not accounting, it may well be said also to arise in Bombay. Further, the Court is asked in the suit to appoint a Receiver. Without deciding whether this Court might or not appoint a Receiver of the property in Bombay, it would certainly be a most inconvenient course to adopt. And I am not prepared to say that this Court could appoint a Receiver for the property which is within the jurisdiction of the Bombay Court. All this shows that the plaintiff cannot bring his case within the part of the clause which says that the cause of action shall have arisen wholly within the jurisdiction of this Court.

Then we have to consider what is the effect of the other part of the clause: "If "the defendant, at the time of the commence-"ment of the suit, shall dwell or carry on "business, or personally work for gain within "such limits." The principal defendant (I should rather say the 1st defendant, for the other defendants are as much interested in the result of the suit as he can be) it is admitted carries on business in Calcutta, and if it be sufficient for one defendant in the suit to dwell or carry on business within the limits of the jurisdiction of the Court, the plaintiff is entitled to bring his suit here, as he has done, and he need not have applied for the leave of the Court. Now the words, if read literally, will not apply to a case of several defendants at all. They are "if the "defendant at the time of the commence-"ment of the suit shall dwell." But that would not be a reasonable construction which the great number of suits with more than one defendant would be left unprovided for, and so we may and ought to read the expression "the defendants" as meaning defendants. But then, if we are to read for one purpose as including the plural, so as to bring suits against several defendants within the clause, it seems to me but reasonable that we should read it in the same way for the other purpose. In fact, to say that it is sufficient for one defendant to dwell or carry on business within the jurisdiction would be to insert something into this clause which is not there. It would be saying that any of the defendants or any defendant dwells or carries on business within the limits, it being necessary to give to the word "defendant" such a meaning as to include more than one for the purpose of applying to suits where there are several defendants. I think we ought also to hold that the dwelling or carrying on business must be of all the defendants. The expression is used as indicating an individual defendant in a suit, but the party defendant to the suit which may be one person or several. This mode of construction has been adopted by the Courts in England upon the Statute 9 and 10 Victoria, Cap. 95, section 128, which uses similar words, and provides for the concurrent jurisdiction of the superior Courts and the County Courts, where the plaintiff dwells more than 20 miles from the defendant or where the cause of action did not arise wholly or in some material point within the jurisdiction of the Court within which the defendant dwells or carries on his business at the time of the action brought. Under that section it has been held that defendant means all the defendants in the suit. Hill *vs.* Salamo, 8 Ex., p. 59, was a case on the construction of the word plaintiff, and in it the previous cases of Parry *vs.* Davies, 1 L. M. & P. 379, and Doyle *vs.* Lawrence, 2 L. M. & P. 368, were recognized as authorities. Baron Platt, who gave the judgment refers to those cases and says: "The Court of Common Pleas adopted Lord Cranworth's decision in Parry *vs.* Davies, and held that the residence of one of the defendants more than 20 miles from the plaintiff made the case one of concurrent jurisdiction within the same section. The same principle must apply to a plurality of plaintiffs."

There the question was whether the plaintiff dwelt more than 20 miles from the defendant, because, by the words of the Statute, if he did, the superior Court had

diction; and the Court held that, if one he plaintiffs lived more than 20 miles the defendant, there was concurrent diction.

he result, then, of a consideration of the e in the Charter is that this was a case hich it was necessary that the leave of Court should be obtained to bring the in Calcutta.

was held by the High Court at Madras eSouza *vs.* Coles, 3 Madras High Court rts 384, that an order made under this e of the Charter was subject to appeal. may not agree in all the reasons which learned Judges of that Court gave for decision, but we do agree in the con- on that this is an appealable order. It great importance to the parties. It is mere formal order, or an order merely lating the procedure in the suit, but one has the effect of giving a jurisdiction to Court which it otherwise would not . And it may fairly be said to deter- some right between them, *viz.*, the to sue in a particular Court, and to pel the defendants, who are not within risdiction, to come in and defend the or, if they do not, to make them liable ve a decree passed against them in their nce.

here the order of the learned Judge is ded upon matters within his discretion, Court on appeal would be reluctant to se his order. And there might be cases re the decision was founded so entirely a matter within his discretion that we ld not do so. Here Mr. Justice Mac- son appears to have proceeded, not so h in the exercise of any discretion which considered he had, but rather to have ght that he was bound by law, and to e decided more on legal grounds than rding to his discretion. His judgment s that, in his opinion, it would be more enient that the suit should be tried in Bombay Court. There is, however, a culty which might have arisen in the suit g brought in the High Court at Bombay. e plaintiff is not residing within the diction of that Court, and, if he had ght the suit there, the defendants might e applied to the Court to compel him to e security for costs. The suit may have n brought here to avoid his being placed hat position. This being a possible hard- p on the plaintiff, we thought we ought nquire whether the defendants, in case it was brought in the High Court at bay, would undertake not to ask for security for costs, and Mr. Ingram, who appeared for them, at once said they were willing to undertake not to ask for security. That being the case, it seems to us that all the circumstances show that this is a suit which ought to be brought in the High Court at Bombay, and not in this Court. This Court, the whole case being before it, and exercising the power which it has of deciding whether it is fit that the suit should be brought here or not, decides that it ought not to be brought here, and that leave to do so ought not to be given. We therefore reverse the order by which the leave has been granted, and the orders dismissing the applications by the appellants to take the plaint off the file, and we direct that the plaint be taken off the file. But, before the order of this Court is drawn up, we must secure the plaintiff by requiring that the solicitors for the defendants give an undertaking on their behalf not to ask for security for costs, if the plaintiff should bring a suit against those defendants in the High Court at Bombay substantially for the same purpose as the present suit is brought for.

We think that the parties should bear their own costs both of this appeal and of the proceedings before Mr. Justice Macpherson. The costs will be taxed as between attorney and client on scale No. 2.

The 6th March 1874.

Present:

The Hon'ble J. B. Phear, *Judge.*

Non-registration—Secondary Evidence.

Case No. 991 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 27th February 1873, affirming a decision of the Moonsiff of Begooserai, dated the 17th August 1872.

Mr. L. G. Crowdie (Plaintiff), *Appellant,*

versus

Kullar Chowdhry (Defendant), *Respondent.*

Baboo Nil Madhub Sen for Appellant.

Baboo Lukhee Churn Bose for Respondent.

The fact that a pottah on which a plaintiff's title is based has not been registered, and therefore cannot be used by reason of the Registration Law, is not a good ground on which a Court would be justified in admitting secondary evidence.

It seems to me that this appeal ought to be dismissed.

The plaintiff brings this suit to obtain a declaration that he is entitled to a certain right of tenancy under the defendant. And he bases his right upon the foundation of a pottah which he says was granted to him by the defendant's father. It appears to be doubtful whether the facts alleged in this plaint furnish a good ground for calling upon the Court to declare in favour of the plaintiff the right which he asks; or, in other words, whether the plaintiff has a good cause of action. But, whether this may be so or not, I think that there is no doubt that the plaintiff can only prove his right, if he has the right, by adducing the pottah which, according to him, passed that right to him, or else by accounting for the absence of the pottah, and giving secondary evidence of its contents, if the reason for the absence is such as would in law justify the Court in receiving secondary evidence. It appears that the only reason why the pottah is not adduced in evidence is that it is not registered, and therefore it cannot be used by reason of the Registration Law. That is not a good ground upon which the Court would be justified in admitting secondary evidence. The decisions of the Courts below therefore appear to be right on this point. The appeal must be dismissed with costs.

The 7th March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Pauper Appeal—Vakeel—Act VIII. of 1859, ss. 301 & 370.

Application for the admission of a Special Appeal in formâ pauperis from a decision passed by the Judge of Sarun, dated the 17th November 1873, affirming a decision of the Subordinate Judge of that District, dated the 12th August 1872.

Mussamut Bhugobutty Kooer and others (Pauper Plaintiffs), *Appellants,*

versus

Gunesh Dutt and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellants.

No one for Respondents.

Court rejected a petition of appeal presented on behalf of a pauper by a Vakeel who was retained under an ordinary retainer, but was not duly authorized to sign as attorney for the appellant.

Phear, J.—THIS application must be rejected. There is no petition of appeal signed by the alleged pauper or by any one who is duly constituted her attorney for the purpose. Section 370 coupled with section 301 of the Civil Procedure Code prescribes the mode by which a person who desires to appeal *in formâ pauperis* should proceed. And those sections are strict in obliging the applicant to appear in person, except in certain specified cases, of which this possibly may be one, when the Court is authorized to receive the petition of the pauper at the hands of a duly-appointed agent. None of the conditions have been complied with in this case. The petition of appeal which has been presented to this Court is simply signed by a gentleman who, as a Vakeel of this Court has been retained under an ordinary retainer to represent the appellant here, and has not been duly authorized to sign the petition as the attorney for this lady. Therefore we have no other alternative than to reject the petition.

The 9th March 1874.

Present:

The Hon'ble W. Markby and E. G. B... *Judges.*

Appeal—Limitation—Copy of Judgment—Act IX. of 1871, s. 13 (Schedule).

Application for the admission of a Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 16th September 1873, reversing a decision of the Deputy Commissioner of Hazareebaugh, dated the 16th ... 1873.

Horil Pattuck (Plaintiff), *Appellant,*

versus

Bhowanee Ram and others (Defendants), *Respondents.*

Baboo Annund Chunder Ghossal for Appellant.

No one for Respondents.

In computing the 90 days allowed by law for filing an appeal to the High Court, an appellant cannot, as a matter of right, claim to deduct the time required for obtaining a copy of the judgment.

Markby, J.—In this case the judgment delivered in the Court below on the 16th September 1873. On the 1st of Novem-, the appellant asked for a copy of the gment and decree. The judgment was vered to him on the 24th, and the decree the 19th. On the 7th of January he his appeal in this Court, and it was med to him as being too late. An appli-n is now made to us to admit the appeal. he appellant contends that he is within . From the 16th of September to the f January is 113 days. The law [sec-13 of Act IX. (Schedule) of 1871] says the time allowed for filing an appeal is ys from the date of the *decree* appealed st, but that, in computing the period of tion, the day on which *judgment* pronounced, and the time required for ning a copy of the *decree*, sentence, or appealed against shall be excluded. cluding the time occupied in obtaining py of this *decree*, namely, 18 days, the llant would still be too late.

he appellant, however, contends that the required for obtaining a copy of the *ment* is also to be excluded; and he s that, in the above provision of the the word "decree" includes the "judg-" also.

nsidering that the word "judgment" is in the very same section as distinguished "decree," I can hardly think this to be case. The words "judgment" and ree" are not generally used in the Code same signification, and when both are ded, both are expressed, as, for example, tion 198. Nor do I think the sense of tion requires this construction. I think ain object of the section was to pro-or any delay there might be in drawing e decree after the judgment was pro-ed; the exact form of a decree being a matter of consideration and discussion the judgment has been pronounced. course, if there were such delay that the llant could not comply with the require-s of section 373, he would have good d for claiming the indulgence of the ; but I do not think that, as a matter of he can claim to deduct more than the required for obtaining a copy of the e.

ere is, however, a case reported in 5 ly Reporter, in which it is said that a on Bench held the contrary upon sec-33 of the Code of Civil Procedure, though it is, as to this matter, now ed, is merely in the same words as the substituted provision of the Limitation Act of 1871. I have some doubt whether that case quite correctly states the opinions of the learned Judges who decided it; nor is the practice of this Court on the original side, as far as I can ascertain, such as is there stated. The practice on the original side is, I am informed, not to enlarge the time to enable the party to obtain a copy of the judgment, as it is supposed that counsel will attend and ascertain the contents of the judgment when it is delivered. By section 183 of the Code, all Judges are required to pronounce their judgments in open Court after having given due notice to the parties or their pleaders, and therefore the same opportunity exists (unless Judges entirely neglect their duty) in the Mofussil as here of obtaining information upon what points the judgment turns.

As, however, it appears that there has been a practice in the office of excluding the time required for obtaining both judgment and decree, it is possible that the appellant has been in this case misled, and therefore under clause *b* of section 5 I think this appeal may be admitted.

Birch, J.—I concur.

The 11th March 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, *Judge*.

Proceedings to keep a Decree in force—Limitation—Act IX. of 1871—Bona fides.

Case No. 330 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Backergunge, dated the 12th July 1873, reversing an order of the Subordinate Judge of that District, dated the 3rd August 1872.

Gouree Sunkur Tribedee (Decree-holder), *Appellant*,

versus

Arman Ali Chowdhry (Judgment-debtor), *Respondent*.

Baboo Kalee Mohun Dass for Appellant.

Mr. J. S. Rochfort for Respondent.

Under Act IX. of 1871, Schedule No. 167, an application for executing a decree is not a proper one, unless it is in accordance with the Code of Civil Procedure, s. 212.

Quære.—What is the effect of the new Law of Limitation upon the High Court's decisions as to the *bona fides* of proceedings to keep a decree in force.

Couch, C.J.—In this case the Judge has laid down that, under the new Law of Limitation (Act IX. of 1871), if the Court considers that the application to keep a decree in force was not made with that object, and the applicant had really no intention of keeping it in force, but only made the application in order that he might show that he was not barred, the Court is fully justified in holding that such application is not an application contemplated by the law sufficient to keep the decree in force. There is apparently some inconsistency in the passage where the Judge says: "With the object of keeping a "decree in force, really with no such intention, "but merely that the decree-holder might "afterwards show that he was not barred." An intention to show that he was not barred would be to keep the decree in force. But it is not necessary in this case, nor is it desirable for us to give any decision as to the effect of the new Law of Limitation (Act IX. of 1871) upon the decisions of this Court with reference to what is called a *bonâ-fide* proceeding to keep a decree in force. In the present case there was no proper application to keep the decree in force, and it was barred by the law of limitation when the application of the 7th May 1872 was made. The application dated the 9th July 1870, which the decree-holder is obliged to rely upon, was not in accordance with section 212 of the Code of Civil Procedure, and certainly the provision in No. 167 of the Schedule of Act IX. of 1871 must be held to require an application to be in accordance with section 212. That is the least that must be done, supposing that the decisions about *bona fides* should be held to be not applicable now. The appeal must be dismissed with costs—two gold mohurs.

The 11th March 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, *Judge.*

Decree—Kistbundee—Execution.

Case No. 390 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Dacca, dated the 30th August 1873, affirming an order of the Additional Subordinate Judge of that District, dated the 11th June 1873.

Dinonath Sen (Judgment-debtor), *Appellant*

versus

Gooroo Churn Pal (Decree-holder), *Respondent.*

Baboos Kalee Mohun Doss and *Kali Kant Sen* for Appellant.

The Advocate-General and *Baboos Sreenath Doss* and *Bykunt Nath Doss* for Respondent.

Where a judgment-debtor has entered into an arrangement (kistbundee) with his judgment-creditor for the payment of the amount due under the decree with interest, by instalments, and the parties have acted upon the kistbundee as if it had become part of the decree, to the extent of moving the Court to credit payment made in satisfaction thereof, the judgment-debtor is precluded, by his own conduct, from saying that the judgment-creditor is bound to execute the original decree, or to bring a regular suit upon the kistbundee.

Couch, C.J.—The decree in this case was made on the 1st of July 1863, and, by a kistbundee dated the 3rd of July 1864, it was agreed that the amount payable by the decree should be paid by instalments with interest. It was an arrangement which the decree-holder might very reasonably make, for, although his decree did not give interest, he

entitled to have the money paid at once. seems to have arranged with the debtor t he would receive it by instalments with erest in consideration of the payment being stponed. Then it appears that an appli-on was made for execution on the 8th of y 1866, and notice was served. That g struck off, a third application was de on the 4th of December 1866, and the perty of the debtor was attached and ertised for sale. A part payment was made, ich was certified to the Court by an appli-ion dated the 7th of March 1867 on the part the debtor, he also asking to have the money plied towards satisfaction of the terms of ment in the kistbundee, treating that as g what was intended to be enforced. en on another instalment becoming due, decree-holder took out execution on the h of January 1870, and the property being ertised for sale, the debtor made an appli-ion, which was assented to by the decree-lder, for time to pay the amount which due, again treating the kistbundee as a ding arrangement, and that which the urt was enforcing by execution-proceed-gs. This application was struck off on the th of May 1870, and the amount not being id as had been agreed, another application s made for the sale of the property on the nd of May 1871. Then the judgment-btor objected to the sale on the ground that fresh attachment was necessary. No ob-ction was made at that time that the ori-nal decree must be enforced, and not the tbundee. The Judge finds that these cts show that the parties had treated and cted upon the kistbundee as if it had become art of the decree, and that they moved the Court to credit the payment which was made a satisfaction of the instalments due accord-g to it. Under these circumstances, I nk that the present appellant is precluded om saying that the judgment-creditor is ound to execute the original decree, and, if he annot execute that, he is bound to bring a gular suit upon the kistbundee. He has, by is conduct for some years, treated this as the ecree which the Court had made. Without eciding how far an alteration of a decree uch as this was could be made by consent the time the kistbundee was entered into, think we must hold in the present case that he objection taken cannot and ought not to evail. The decree-holder is entitled to ke proceedings upon the kistbundee as if it ere a part of the original decree. The ppeal must be dismissed with costs—Rs. 32.

Jackson, J.—I am of the same opinion.

The 12th March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Mahomedan Law—Pre-emption.

Case No. 952 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 20th February 1873, reversing a decision of the Moonsiff of Tajpore, dated the 22nd August 1872.

Girdharee Kooer and others (Defendants), *Appellants,*

versus

Shaikh Deanut Ali (Plaintiff), *Respondent.*

Baboo Hureehur Nath for Appellants.

Baboo Judoo Nath Sahoy for Respondent.

A right of pre-emption is lost where a party is aware of the sale of the property for some time before he asserts the right publicly.

Phear, J.—We think that the decision of the Lower Appellate Court is erroneous. The first Court stated: "The attesting witnesses "prove to the satisfaction of the Court that, "when the kobala was executed, the plaint-"iff was present in the Collector's office at "Tajpore, and that the document was drawn "up and delivered in his presence."

The Lower Appellate Court in no way alters these facts. It says: "According to "the Mahomedan Law, the right of pre-emp-"tion does not accrue until the sale has been "actually effected. Whether, therefore, the "plaintiff objected or not at the time of the "execution of the kobala is immaterial, for "the sale is not actually effected until the "kobala is completed, from which time the "pre-emptor's right accrues."

Now we must, we think, assume from this statement that the Judge saw no reason for saying that the finding of the first Court was wrong, which was to the effect that the kobala was drawn up and delivered in the presence of the plaintiff. But, if the koba-la was drawn up and delivered to the pur-chaser in the presence of the plaintiff, it must have been an intimation to him that the sale of the property had been made by the proprietor to the present defendant. And, if that be so, then, as we understand the Maho-medan Law, there can be no doubt that it was incumbent upon him, if he desired to

maintain his right of pre-emption, to have at once asserted it by performing the first preliminary ceremony. The policy of the Mahomedan Law is plain enough; and, although it may appear sometimes to English Lawyers that if technical strictness with regard to the performance of these preliminaries is insisted on, it almost leaves no opportunity to the person concerned to consider whether it is worth his while or not to claim the right of pre-emption, yet it is not by any means difficult to see a reason for confining claims of this kind within the narrowest possible limits. And our Courts have always, as far as we are aware, adhered to the technical strictness of the old Mahomedan Law on this point. It appears from the judgments of both the Courts below that the plaintiff was aware of the sale made by the proprietor of this property to the defendant for some time before he made, by the performance of the proper preliminaries, public assertion of his right of pre-emption. He has, therefore, lost the right, and cannot succeed in this suit.

We reverse the decision of the Lower Appellate Court, and affirm that of the first Court, with costs.

The 13th March 1874.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Suit on behalf of Minor—Court of Wards—Costs.

Case No. 252 of 1872.

Regular Appeal from a decision passed by the Deputy Commissioner of Singhboom, dated the 29th August 1872.

Rajah Bikromajeet Mullo Ogalsundo Deb (Defendant), *Appellant,*

versus

The Court of Wards on behalf of Rajah Ram Chunder Dhubul Deb, minor (Plaintiff), *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

A suit on behalf of a minor by the Court of Wards, which was the Deputy Commissioner before whom it was instituted, having been dismissed in appeal by the High Court, it was *held* that the Deputy Commissioner, by whose authority it had been instituted, ought not to have tried the suit, and that, though, in an ordinary case, the person who appeared on the record on beha infant would be liable for the costs, in this cas Deputy Commissioner was no longer in office two innocent persons must bear the costs. eit minor or the defendant. It was determined acc that the defendant must suffer, as he was in blame for allowing the suit to proceed.

Markby, J.—In this case the pl described as the "Court of Wards on of the Rajah Ram Chunder Deo D Deb," sues the Rajah Bikromajeet Ogalsundo Deb to recover Rs. 2,00 interest amounting to Rs. 3,100— Rs. 5,100—in respect of a loan contrac Cheyt 1271.

The substance of the plaintiff's c that in Cheyt 1271 the Rajah Bikro borrowed from the Rajah Juggernath Dhubul, the father of the minor, Rs. to be repaid in four or five months w interest; that in Srabun 1272 the Juggernath being at Midnapore boug elephant and calf, and in order to pay borrowed from certain persons calle Koondoos, who are bankers at Midn Rs. 1,995; that he already owed Rs. 1,000, and that he gave them a spec registered bond for Rs. 2,995; that, in to pay off this sum, the Rajah Jugge gave what is called *burrat* or order the Rajah Bikromajeet to pay his de Rs. 3,000 to the Koondoos, which the Bikromajeet promised to do. The pl then says that Rajah Juggernath informed by Rajah Bikromajeet that this of Rs. 3,000 had been paid to the Koon and that he, therefore, took no steps t the debt himself; but that, nevertheless, time before 1274, the Koondoos took execution on their specially-registered b and notwithstanding the assertion of Rajah Juggernath that the money had paid, execution was allowed to pro The case was appealed, but the objec were disallowed by the Appeal Court o 21st Cheyt 1277 (3rd April 1871), an money was paid to the Koondoos.

The Rajah Juggernath had died a early stage of the proceedings in execu namely, in 1274, and they were subsequ resisted on behalf of his minor son by Court of Wards.

The cause of action in this suit is sa have arisen on the 21st Cheyt 1277, w the appeal in the execution-case was missed. But what that cause of actio is not very clearly stated in the plaint. Deputy Commissioner says that the C of Wards are suing the Rajah Bikrom for his *breach of faith.* The Govern

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der has, in this Court, stated that the ge by the Court of Wards against the n Bikromajeet is that he had colluded the Koondoos to get the money paid over. This is exceedingly vague, and very much doubt whether there is any cause of action than that upon this nal loan which would, of course, be d. But the Rajah Bikromajeet has not ed strongly on this part of the case, it is very natural that he should desire merits of the case to be inquired into, h are in substance this: Whether or no paid the Rs. 3,000 to the Koondoos as ested, and as he all along solemnly ted to be the case. If he did not, he been guilty of base fraud; if he did, suit and the charges which it involves unfounded.

ow what is the evidence on this point. Court of Wards caused interrogatories e administered to the Rajah Bikromajeet, he has sworn point blank that he paid money by an order upon the Koondoos nselves, which order, he says, the Koon- s paid and debited to him in their books ccounts, and he asks that their books of ounts may be produced and examined: he further says that the Rajah Jugger- h did receive that amount from the Koon- s. Pitambar Aree, Bullobhuddur Singh, d Ougoth Narain Singh support this state- nt; and Ram Nidhy Koondoo admits that received this order, and states that he paid money to Rajah Juggernath, debiting the me to the Raja Bikromajeet. He goes on to that he gave Rs. 1,000 to Rajah Jugger- th, but that he applied the balance not to e elephant-debt, as it is called, but to a bt of Rs. 2,000 due on the settlement of other account.

The Deputy Commissioner in his judg- ent (page 13) says that "as defendant's object in causing the production of the *khatta* is satisfied in Ram Nidhy's deposi- tion, the Court fails to see the necessity of insisting on the production of the *khatta*." nd lower down he decides the important oint in the case in these words: "From the foregoing I find the elephant-debt was incurred on the 11th Srabun at Midnapore, and its tumassook was registered on the 13th Srabun, and, therefore, must have been subsequently to the settlement of the *burrat* issued by Bikram; and as Bikram admits in his sworn testimony that there was *burrat* to him from Juggernath for payment of the elephant-debt, and that he honoured the same, I feel satisfied that he "must have been still in Juggernath's debt "when he did so. The *burrat* from Bikram "for Rs. 3,000, if true, but of which I am "very sceptical, cannot possibly be received "in satisfaction of Juggernath's *burrat* for "Rs. 2,995, for the greater portion of the "latter money as price of the elephant was "incurred subsequently, and after settlement "of the said alleged Bikram's *burrat*. And "further, as Bikram, in his written plea, "alleges, contradictory to his sworn testi- "mony, that he received no *burrat* for the "elephant-money, it is as clear as possible "that his *burrat* did not include it."

We must confess that we are wholly at a loss to understand how upon this evidence these conclusions could be drawn. There has been no evidence shown to us that the elephant-debt was incurred on the 11th Srabun—that was the day on which the bond was dated; but it is quite possible that the debt was incurred previously. There seems also to be a doubt in the Deputy Commissioner's mind whether the Rajah Bikromajeet ever gave a *burrat* on the Koondoos. There is, however, the evidence of five witnesses that he did so, and not a particle of evidence the other way. Moreover, had there been any doubt as to the *burrat* having been given, of its having been paid by the Rajah Bikromajeet, and of its having been received by the Koondoos on account of the Rajah Juggernath, the Deputy Commissioner should have examined the books of the Koondoos as requested. It could not be right at the same time to refuse to enforce the production of these books as unnecessary, and to find against the defendant the fact which he was desirous to prove by them, and of which they would be the best evidence. It is also said that, even if the *burrat* were given, it cannot be received in satisfaction of Juggernath's debt for Rs. 2,995. That is a different point from the question whether the *burrat* was given at all to the Koondoos, and required a fuller examination.

It seems to have been contended below, and it has been contended here, that the order given by the Rajah Juggernath on Rajah Bikromajeet was a special one to pay the bond-debt; and it was obviously the object of the second question asked of the Rajah Bikromajeet on the 18th August 1872 to establish that this was the case. But the Rajah in his written statement denies this, and, in his answer to the interrogatory, he guards himself against admitting it.

We do not think the Deputy Commissioner

is right in saying that in these two statements there is a contradiction. The admission was only that there was an order to pay the debt of Rs. 2,995. The denial is that that order specially directed him to pay the bond-debt. That we think is the true interpretation of the defendant's words. He brings no charge against the Koondoos, but contends that he has nothing to do with the way in which they appropriated the money. And on the evidence before us, we consider he was justified in that contention. There is no evidence whatever of any such special direction having been given. Still less of any undertaking on the part of the Rajah Bikromajeet to see that the money was applied to this particular purpose. The real and only question in this suit was whether the Koondoos had been paid by the defendant. Whether, having got this money, they were bound to apply it to the bond-debt was a question between the Rajah Juggernath and the Koondoos, with which the defendant has nothing to do.

We have no doubt, therefore, that the suit ought to be dismissed; and we feel also bound to add that, had the matter received that consideration which it ought to have received before the plaint was filed, we do not think the suit would have been brought.

We have also no doubt that this is a case in which the defendant would ordinarily be entitled to recover his costs both in this Court and in the Court below.

It has, however, been necessary for us to consider whether we can make any order which will make the minor ultimately liable or, indeed, any order at all, for the payment of the costs of this suit. In an ordinary case no difficulty would arise upon this, because the person, who appeared upon the record as next friend on behalf of the infant, would be liable for the costs, and he would have to justify his conduct in bringing the suit, when he made the claim, to be reimbursed out of the minor's estate.

But there is in this case the name of no person upon the record against whom costs can be given. The suit is said to be brought by the "Court of Wards on behalf of the minor Ram Chunder Deo Dhubul Deb," but we cannot give costs against the Court of Wards, or against the minor in person. In this state of things, we have endeavoured to discover who is responsible for this suit being brought; and as far as we are able to discover from the record, the suit originated with the Deputy Commissioner himself, who tried the case. It appears that he wrote or authorized to be written a letter of demand, and th is upon the record an order signed b Deputy Commissioner to a vakeel to t steps to institute this suit.

The Government Pleader, upon this ma being brought to his attention, has den that the suit was conducted by the Dep Commissioner, but beyond this denial further explanation has been offered to We cannot but feel most anxious that denial should be well founded, but it certai appears that the Deputy Commissioner set this suit on foot.

Moreover, the Deputy Commissioner his executive capacity is the proper per to bring this suit, if the Ward has manager. No person can by law institut suit on behalf of the minor except manager, or the officer in charge of revenue-jurisdiction of a district [Act (B.C.) of 1870, sections 1, 69].

Whether the Deputy Commissioner h self conducted this case or no, he certai ought not to have tried it. It was institu by his authority, and under the law (s tion 71) every process ought to have be served upon him, with the obvious intent that he should exercise a general super tendence over the conduct of the suit.

We cannot attribute any want of go faith to the Deputy Commissioner in case, but we consider that there has been far as we are able to discover) a compl disregard of the law in the conduct of t suit; and as we have pointed out the s itself has been rashly brought.

Under these circumstances, had t Deputy Commissioner still been in offic we should have felt bound to make so further inquiry into this matter. But, as are informed that he has left the countr we have only to determine which of t innocent persons shall suffer—the defenda who has had to resist a groundless claim, o the minor on whose behalf that claim ha been put forward.

Upon the whole, we think it is the defend ant who must suffer. In fact, an orde addressed, either to the Court of Wards o to the minor in person, to pay these cost being illegal, and the party responsible fo bringing the suit not being before the Court, there is no other person whom we can make liable for costs. Moreover, the defendant is himself in part to blame for allowing this suit to proceed. Had he made a proper application for that purpose, he would have had a right to prevent the suit from being carried on, unless a next friend, who would

responsible for costs, were properly pointed.

The 6th February 1874.

Present:

James W. Colvile, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Municipal Debentures—Interest—Quit-rent—Letters—Registration.

*Appeal from the High Court of Judicature at Fort William in Bengal.**

The Port Canning Land Investment Reclamation and Dock Co., Limited,

versus

A. Smith.

The Port Canning Municipal Commissioners invited tenders on debentures convertible into leasehold titles to lands in the town. The Port Canning Land Company subscribed to the loan, declaring their desire to take lands in lieu of the debentures. After the debentures were issued, a correspondence commenced between the parties with the object of effecting the conversion, in which correspondence the Commissioners intimated to the Company the construction they put upon the Company's tender, *viz.*, that they elected to take land to the value of their debentures. The Commissioners also intimated to the Company that the latter had selected lots amounting to a part only of their debentures, and required them to select others, giving notice at the same time that they did not consider themselves liable to pay interest. The Company after this proposed to defer exchanging the debentures till their due date, and, if the Commissioners consented, not to call for the interest in the meantime, but agreeing to pay a quit-rent equivalent to the interest. The Commissioners agreed to this, and asked the Company to declare the lots which they would receive in commutation. A selection was made, but not in accordance with the contract; the lots selected being of more value than the debentures. The Commissioners then proposed that the Company should return the debentures, and pay quit-rent upon the additional lots. This was not accepted, but the matter was left in an imperfect state. The Port Canning Land Company subsequently brought an action against the Port Canning Municipality for two years' interest on the debentures:

HELD that the non-acceptance of the proposal as to the additional lots could not affect the previous agreement to exchange debentures then held for equivalent lots; and that such previous agreement had been made involving quit-rent which extinguished the interest.

HELD that the letters did not require registration, for they did not amount to a lease or an agreement for a lease, but were evidence of a contract of a special character not coming within any of the definitions in the Registration Act.

THIS is an appeal from a judgment of the High Court of Judicature at Fort William in Bengal. It arises in an action brought by a Land Company, called the Port Canning Land Investment Reclamation and Dock Company, against the defendant, the Chairman and representative of the Municipal Commissioners of the Town of Canning. The action is brought upon some debentures of the Municipality which were given to the Land Company, and the claim in the action is for two years' interest, the interest being payable by half-yearly payments, from the 1st January 1867 to the end of December 1868. The plaintiffs have undoubtedly a perfect *primâ-facie* case upon the debentures for that interest. The defence set up on the part of the Municipality is that there was an agreement come to between the Land Company and the Municipality by which it was agreed that the debentures should be exchanged for land at the time when the debentures matured, which was a period of five years after their date, and that, meanwhile, the exchange being alleged on the part of the Municipality to have been completely contracted for, a quit-rent should be paid for the land equivalent to the interest which was accruing upon the debentures—the intention of the parties being that the interest should be extinguished by that agreement to pay the quit-rent.

The question in the appeal is whether a complete and perfect agreement was come to between the parties to that effect. The case has been ably argued on both sides, with the result which very often follows in a case properly argued, of reducing the point to be decided to a very narrow issue. The whole depends upon the correspondence; and the question is whether the agreement relied on by the defendants is established by some of the letters of that correspondence.

The Company was formed, as appears by their prospectus which has been referred to, for the purpose of obtaining land in Port Canning. The Municipality appear to have considerable land in that town, and were desirous of making it a place of trade. They raised money by issuing debentures, but they gave the holders of those debentures the election to exchange them for land. That right of election is found in a notice which was issued by the Municipal Commissioners when they invited tenders for the loans upon these debentures. The 5th article of that notification is this: "Debenture-holders are to be entitled to convert "their debenture, to the extent of one-half "of the entire loan raised, into leasehold "titles to lands in the town, within a period "of two years from the issues of the debentures, at the rate of Rs. 600 of loan for one "beegha of ground. Such privilege of conversion to be given to debenture-holders in "order of the dates on which applications

* From the judgments of Peacock, C.J., and Macpherson, J., on appeal from a decision of Phear, J., sitting in the Ordinary Original Civil Jurisdiction of the High Court.

"for such conversion are received by the "Commissioners. The leasehold title so "conferred to be for sixty years on a rental "of Rs. 30 per beegha per annum." Then a further option is given: "Such lease- "holders to be further allowed to convert "their leasehold into freehold tenures by a "cash payment at the rate of Rs. 600 per "beegha, provided such privilege be claimed "within four years from 1st January next."

The plaintiffs, the Land Company, agreed to subscribe 2½ lakhs of rupees and 200 rupees. That subscription was evidently made by them with the intention of exchanging the debentures they would obtain for land; for, by a letter of the 13th March 1865, written before the debentures were issued, the Company declared their desire to take land in lieu of them to the full amount of the loan.

Very soon after the debentures were issued, a correspondence commenced between the Company and the Municipal Commissioners, with the object of effecting the conversion. The letters on both sides are unbusinesslike. Letters are written and left without an answer, and then a fresh departure is made without reference to preceding letters. That correspondence, in the way in which it has taken place, no doubt imposes some difficulty upon those who have to construe it; but, as I have already said, after the matter has been threshed out, it really appears that the point is a very simple one. The first letter relating to the conversion, after the issue of the debentures, is on the 5th January 1866. It is a communication from the Commissioners to the Company, and is a spur to the Company to exercise their option, if they mean to do it, of taking land. It is this: "DEAR SIRS,—Mr. Kilburn having "applied to have certain lots out of the "following numbers assigned to him on "freehold title in exchange for debentures, "*viz.*, Nos."—naming several numbers— "I shall feel obliged by your intimating "what lots amongst these numbers your "Directors desire to select and retain for "the Company, so as to enable me to inform "Mr. Kilburn what lots will be available to "him for redemption." It seems no answer was given, but there was some intermediate correspondence respecting an alteration in the debentures, which it is immaterial to consider. The next letter is again from the Commissioners to the Company, of the date of the 18th September 1866: "GENTLEMEN,— "I am directed by the Chairman to request "that you will give your immediate attention "to the following: On the 13th M "1865 the Port Canning Company thr "you applied distinctly to have lots assi "to them in lieu of the debentures w "are to be given for the amount subscr "by them to the loans. You applied "cifically for lots"—naming them— " "asked for other land in lots adjacent to "proposed new dock, and such other "near to the railway, or in other desir "situations, to such an extent as may "the equivalent of the said amount of lo "This is a distinct and formal intima "that the Port Canning Company "themselves of the privilege allowed "debenture-holders by article 5 of "published conditions of the loan." Commissioners thus directly intimate the Company the construction they upon their letter, *viz.*, that they had ele to take land to the full value of their deb tures. The letter goes on: "No for "letter was sent to the Canning Comp "on receipt of their application, placing "specified lots at their disposal; but, on "5th of January 1866, the Secretary to "Municipal Commissioners wrote to "Secretaries of the Canning Compa "requesting that they would intimate w "lots they required among certain numb "specified in the letter, as Mr. Kilbu "another debenture-holder, had applied "lots, and the Commissioners could not tell "Kilburn which of the lots were availab "until the Canning Company had made th "selection. No reply was received from "Canning Company to this request, but, "April 1866, the Secretary to the Comm "sioners addressed Mr. W. C. Stewart, acti "on behalf of the Canning Company, on "subject. To this letter also no reply w "returned." Then they refer to anoth letter having been written: "The l "applied for by Port Canning Compa "in commutation of their debentures ha "always been considered as transferred a "held at the disposal of the Port Canni "Company; and it now only remains f "the leases to be completed, and debentur "to be sent into this office to the value o "Rs. 2,04,928, being the amount of the loa "which these lots represent under the 5 "article of the published conditions of th "loan." Then the letter goes on to urg the completion of the exchange: "I am "further directed to request that your Com- "pany will, without further delay, select "such other available lots as may be required "to make up the redemption of the entir

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um subscribed by them to the loan, and to ve notice that the Commissioners repu- iate any liability to pay interest on the mount subscribed by the Canning Com- any, or to repay the loan, except in the hape of grants of land, as applied for by e Company in their letter of the 13th larch 1865." There is thus a most dis- t intimation on the part of the Municipal mmissioners that they hold and treat the t Canning Company as having applied for exchange of the whole of their debentures land; that the Company have only selected which amount to a part of the whole ount of their debentures; that they require Company to select the other lots, and d in their debentures, and expressly give ice that from that time they do not con- r themselves liable to pay interest.

hen come the two important letters, ch cannot be fully understood without rring to this previous correspondence. e letter of the 20th of December 1866 is m Mr. Schiller, who represents the Land mpany, to the Commissioners: "SIR,— ith reference to the debentures held by e Canning Company which I agreed to change for land"—thus in answer to the er the effect of which I have given, which rs to an agreement, this letter also refers e exchange as a thing agreed on—"with ference to the debentures held by the anning Company which I agreed to change for land, I now beg to propose that ch exchange be deferred till their due ate." That proposal, as Mr. Benjamin s, is an application for an indulgence. The mmissioners were pressing for an immediate change, and that interest should stop, and is a counter-proposition: "I know I ave agreed to that, but, if you will consent, wish to have the exchange postponed until e debentures become due." And then mes this proposal of what the Company ll do, so that the Commissioners shall be der no loss, and shall not be liable to the erest in the meantime: "This will involve e payment of interest by the Municipality o the Port Canning Company"—of course, would be so; for, the debentures being extant, interest would be payable upon m—"but the latter is prepared to declare ow the lots they will receive in exchange or debentures, and to pay a quit-rent hereon equivalent to the interest payable n their debentures. The Municipality will us lose nothing, and the arrangement will e a convenience to the Canning Company." ey really say this: If you will, for our convenience. postpone the exchange of the debentures for land till the debentures become due, you shall be no loser; we shall not receive the interest, for we agree to pay you a rent which will be equivalent to it, and therefore one will extinguish the other. That is a distinct proposition. The fair meaning and substance of the whole letter is, we have agreed to take lots to the full amount of the debentures; and if you will consent to the exchange being postponed until the debentures become due, we will not call upon you for the payment of interest in the meantime, and we are now willing to make the selection. But the selection lay with the Company; it might be for their interest to make it then, or it might be more for their interest to make it at a future time. The answer comes on the 14th of March 1867 from the Commissioners: "DEAR SIRS,—With refer- "ence to the letter from Mr. Schiller, dated the "20th of December 1866, copy of which is "on the other side, I am instructed by the "Chairman of the Municipal Commissioners "of Canning to state that they agree to the "proposal contained in that letter." That proposal I have already interpreted, and there is a distinct acceptance of it. Then they add: "And to request that you will at once declare "the lots which your Company will receive "in commutation of the debentures taken by "your Company, so that the Commissioners "may know exactly the lots which they are "bound to hold for the Company." The agreement was perfect—that there should be an exchange, that the time of exchange should be postponed till the debentures became due, no interest being payable in the meantime, and the Company being at liberty to select the lots they desired to take. Their Lordships think that the latter part of the letter as to the selection of the lots is not a part of the contract requiring further affirmance to bring the parties to a complete agreement, but relates to the execution of that which they had agreed upon. The two following letters, which it was Mr. Cowie's object to make a part of the agreement (his contention being that it was not perfected by the previous ones), appear to their Lordships to be only an attempt to carry it into execution. There is a selection of lots on the part of the Port Canning Company, and an intimation from the Municipal Commissioners that the Company had made a selection which was not in accordance with the contract. The letters are the letter of the 2nd April and the answer of the 22nd of August. They really amount to this: The letter of the

Land Company professing to carry out the agreement says: "We have selected these "lots, which are the lots we are willing to "take in pursuance of the agreement of "exchange for the debentures, and which we "think are about the amount of the deben- "tures." The Commissioners' answer is: "Well, we have no objection to your having "those lots, but we are bound to tell you that "you cannot have them for the debentures "you now hold, because their value is half a "lakh more than the amount of those deben- "tures, but we have no objection, if you will "return debentures, and pay quit-rent upon "the value of the additional lots, that they "shall go to you." That proposal has never been accepted; but the non-acceptance of that proposal, and its being left in an imperfect state, both parties being at liberty to refuse, the one to take, and the other to give in exchange the further quantity of land, cannot affect the previous agreement to exchange the debentures then held by the Company for lots equivalent in value to their full amount. That agreement was already made, and in their Lordships' view all that remained to be settled was the execution of it by the selection of the lots in accordance with the contract. The case is in this view extremely simple. It is an agreement to exchange, where on the one side the thing to be exchanged is already defined and specified, and where that which is to be taken in exchange is to some extent indefinite, and requires a further act to ascertain it. Suppose A and B had agreed to make an exchange of this sort; A agrees to give to B six cows, specific cows, in exchange for six horses which he is at liberty to select out of the stock then upon B's farm, the selection to be made at a future time; that is a perfect agreement for the exchange, and all that remains is that A should select the horses on B's farm. There might be a dispute whether the horses that were upon the farm at the time of the agreement had not been removed, and others substituted; they might differ as to the horses which were intended to be taken in exchange; but that would not affect the agreement, but would be a question of the mode of performance of it.

A question was raised whether the letters did not form an agreement which should have been registered under the Indian Registration Act; but their Lordships think that the High Court was perfectly right in holding that the letters did not require registration. They do not amount to a lease or an agreement for a lease, but are evidence of a contract of a special character, not coming within any of the definitions found in the Registration Act.

On the whole, therefore, their Lordships think that the judgment of the High Court which reversed the judgment of Mr. Justice Phear, is correct; and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

The 27th February 1874.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Act IX. of 1859, s. 20—Limitation—Disability—Saving as to Minors, &c.

On Appeal from the High Court of Judicature at Agra.

Mohummud Buhadoor Khan and others

versus

The Collector of Bareilly and others.

Act IX. of 1859, s. 20, which provided for suits brought in respect of property forfeited to the Government as the property of rebels, was intended to be of a general nature affecting claims to such property before whatever Court prosecuted, and not only claims prosecuted before the Commissioners established by the Act.

The limitation here enacted cannot be construed as implying any saving with respect to persons under disabilities.

THE only question in this appeal, which comes before their Lordships in the shape of a special case, is whether the suit brought by the appellants against the Collector of Bareilly and the purchasers from the Government, to recover certain landed property in Bareilly, is barred by limitation. The appellants claim the property as the heirs of their father, Mohummud Tuffuzool Hossein Khan, who died on the 22nd of April in the year 1854. The special case states that it is to be assumed for the purposes of the case that the father of the appellants was, on his death, entitled to the property sued for. That statement is made only for the purpose of raising the question which is for their Lordships' consideration on the Statutes of Limitation. It appears, however, upon the special case that, before and at the time of the death of Mohummud Tuffuzool Hossein Khan, one Khan Buhadoor Khan was in the actual possession of the property. That person became a rebel, and, in May 1858,

property was seized by the Government forfeited on the ground of his rebellion. the time of their father's death, and of forfeiture of the property, the appellants were minors. The elder appellant came of age in 1861, and the younger February 1864. The present suit was ought on the 1st of May 1865, and at t time the elder appellant had been, as pears from these dates, of age for four ars, and the younger appellant for upwards a year.

The Act of Limitation which is relied on the Government is Act IX. of 1859. at Act was passed for the special purpose providing a Court for the adjudication of ims by innocent persons upon the property rebels which had been forfeited to the vernment. It established a special Court, nsisting of three Commissioners, and susnded the action of all other Courts in pect of such claims. Special modes of oceeding are established, and various uses in the Act relate to that special rse of procedure. But there are proions in the Act which relate not merely the Court so established and the procedure der it, but are of a general character, and ply to the property forfeited in whatever urt the claims may be made regarding it. e of those clauses is clause 16, which ovides: "Whenever any person shall have been convicted of an offence for which his roperty was forfeited to Government, no Court has power, in any suit or proceeding relating to such property, to question the alidity of the conviction." Sections 17 d 18 are also clauses of a general nature, d so it appears to their Lordships is clause , which contains the limitation on which e Government rely. The clause is this: Nothing in this Act shall be held to affect the rights of parties not charged with any offence for which upon conviction the property of the offender is forfeited in respect to any property attached or seized as forfeited or liable to be forfeited to the Government; provided that no suit brought by any party in respect to such property shall be entertained, unless it be instituted within the period of one year from the date of the attachment or seizure of the property to which the suit relates."

It was suggested that this limitation was meant to apply only to claims prosecuted before the Court of Commissioners established by the Act, and it was contended that the Act was of a temporary nature, and that its provisions fell with the purpose for which it was passed. But the Act is not made temporary by any enactment. It was in part repealed by the general repealing statute of 1868, that is, Act VIII. of 1868, and the mode of repeal is significant. It is not altogether repealed, for the general clauses to which I have referred, including clause 20, are saved from the operation of the Repealing Act. The repeal and saving are both found in the schedule to Act VIII. It is clear from their being thus saved that these clauses were at that time considered by the Legislature to be of a general nature, affecting claims to property which had been forfeited, before whatever Court those claims might be prosecuted.

The words are perfectly plain. No suit brought by any party in respect of forfeited property shall be entertained unless it be instituted within the period of a year from the date of seizure. It is true that this limitation is introduced by way of proviso. But their Lordships think that, looking at the various parts of the Act, and gathering the purpose and intention of the Legislature from the whole, this was a substantive enactment; and that, although it appears under the form of a proviso, it was a limitation intended by the Legislature to apply to all suits brought by any persons in respect of forfeited property.

Assuming, then, that the case is within the Act, their Lordships will consider the other objections which have been raised. The answer first put forward was that this limitation could be held only to apply to some right, title, and interest—using the words of the ordinary Execution Acts—of the rebel himself. Now, it is obvious, that this cannot be the right construction of the Act. It would be a wholly insensible enactment if it were, because the Act assumes that the interest of the rebel is forfeited, and it is only in respect of claims other than this that this limitation could operate. The Act is declared not to affect that rights of parties in respect of the property seized. "The property" is the thing seized as forfeited, whether it be land or a jewel, and the right referred to is the right of an innocent party, other than the right of the rebel, in that property.

Another contention, which seems to have been the only one urged in the High Court, as far as it appears from the judgment, is that a saving, with respect to parties under disabilities, must be taken to be by equitable construction implied in this clause. Their Lordships, however, think it is impossible

that any Court can add to the statute that which the Legislature has not done. The limitation is enacted in plain and absolute terms. The Legislature has not thought fit to extend the period which it has prescribed to persons under disability. Where such enlargements have been intended, they are found in the Acts containing the limitation, as in the general Act. This Act contains no such saving, and their Lordships would be legislating and not interpreting the statute if they were to introduce it.

It was said that the clauses in the general statute, Act XIV. of 1859, relating to disabilities, might be imported into this Act, but this cannot properly be done. Act XIV. is a code of limitation of general application. This Act is of a special kind, and does not admit of those enactments being annexed to it. It is to be observed that, if it could be done, it would not assist the appellants, because the limitation of Act IX. is one year only, and the saving in favour of minors in section 11 of Act XIV. would not bring them within time, as a year elapsed after they came of age before the bringing of the present suit.

One other objection requires to be noticed that this Act was not retrospective. Undoubtedly, Mr. Doyne was able to suggest cases in which hardship might arise to persons who would not have a full year to claim before they would be barred under the provisions of this Act, or even where the year might have elapsed between the date of the confiscation and the passing of the Act. Although hard cases may arise, their Lordships consider that the Act is plainly retrospective in its operation, and includes claims to forfeited property which had been confiscated previously to its passing.

Their Lordships are of opinion that the judgment of the High Court is right, and they must humbly advise Her Majesty to affirm it.

Mr. Forsyth.—One of the questions is: "Whether, if it shall be decided that "the appellants or either of them is barred "by limitation, the Government respondent "shall have any, and what, costs of this spe- "cial case?"

After a discussion on this question—

Sir M. Smith said: According to the course of their Lordships' decisions the Government are entitled to the costs. Whether they will think that under the circumstances they should enforce payment of them from the respondent is for their consideration.

The 4th March 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, J. B. Phear, W. Markby, and E. G. Birch, *Judges.*

Additional Judge—Act VIII. (B. C.) of 1869, s. 102—Jurisdiction—Appeal.

In the Matter of an Application for Review of Judgment passed by the Hon'ble Justices Phear and Ainslie, on the 9th April 1873, in Special Appeal No. 1 of 1872.

Brojo Misser (Appellant), *Petitioner*,

versus

Mussamut Ahladee Misrain and others (Respondents), *Opposite Party.*

Mr. J. S. Rochfort for Petitioner.

Baboo Bhowanee Churn Dutt for Opposite Party.

HELD (Jackson, J., *dissentiente*) that an Additional Judge comes within the meaning of Act VIII. (B. C.) of 1869, s. 102, and that an appeal does not lie from a decision in cases of the nature described in that section any more than from that of a District Judge.

This case was referred to the Full Bench on the 9th December 1873 by Phear and Ainslie, JJ., with the following remarks:—

Phear, J.—We think that this matter must stand over, and the further hearing be postponed, in order that we may refer for the decision of a Full Bench the question whether or not an Additional Judge invested with the powers given to him by Act VIII of 1871 is a District Judge within the meaning of section 102, Act VIII. (B. C.) of 1869.

Before the Full Bench, Mr. Rochfort for the appellant contended that, though the amount of money originally sued for was less than Rs. 100, still an appeal to the High Court would lie, on the ground that the judgment in the case was decided not by a *District Judge* of the Court, but by the Officiating Additional Judge.

According to section 102 of Act VIII (B.C.) of 1869, the right of appealing to the High Court is not *withdrawn*, but the section simply says that no right of appeal is *conferred*. If, therefore, this section does

ot take away the right of appeal, it is ecessary to see whether any right of appeal xists independently of that section.

Section 34 of Act VIII. of 1869 states: That the Code of Civil Procedure applies n all matters not provided for by that Act." Section 372 of the Code of Civil rocedure (Act VIII. of 1859) says that less there be a positive prohibition, a ecial appeal will lie from all judgments ssed in regular appeal. Moreover, sec- n 102 of Act VIII. of 1869 (which is e prohibiting section) must be construed strictly as possible; it is this section hich "confers no power of appeal in any uit tried and decided by a District Judge riginally or in appeal, if the amount sued for, or the value of the property claimed, does not exceed Rs. 100."

In this case the judgment was that of e Officiating Additional Judge, who was t the District Judge within the meaning section 102 of Act VIII. of 1869, and erefore an appeal to this Court would lie. r. Rochfort referred to the case of Maho- ed Munoor Mean *vs.* Sreemutty Jybunee d another, 19 Weekly Reporter, p. 200; d to the case of Nubo Kristo Koondoo *vs.* azir Mahomed Shaik and others, Weekly Reporter, p. 201; in both of hich cases Mr. Justice Jackson decided at "Act VIII. (B.C.) of 1869, section 102, related only to suits tried and decided by the District Judge, and not to those decided by the Additional or by the Subordinate Judge."

Baboo Bhowanee Churn Dutt, *contra*, con- nded that Mr. Henderson, the Additional dge, was invested with the full powers nferred on him by section 7 of Act VI. 1871, paragraph 2, which said that Additional Judges shall perform any of the duties of a District Judge under Chapter III. of this Act that the District Judge may, with the sanction of the High Court, assign to them, and, in the perform- ance of such duties, they shall exercise the same powers as the District Judge." ow Mr. Henderson did perform the duties a District Judge under Chapter III. of is Act, and he ought, therefore, to be egarded as a District Judge within the eaning of section 102 of Act VIII. of 1869. If, by reason of the powers so invested in im, Mr. Henderson had the right of hearing ll appeals which it was in the province of e District Judge to hear, the present ppeal should be dismissed with costs. aboo Bhowanee further contended that, as the amount of the money originally sued for was less than Rs. 100, no appeal to this Court would lie under section 102 of Act VIII. of 1869. He cited a case similar to the present one (Special Appeal 768 of 1872), heard on the 28th of February 1873* before the Chief Justice and Mr. Justice Glover, when their Lordships held that no appeal would lie to this Court from a judgment given by an Additional Judge.

The judgments of the Full Bench were delivered as follow:—

Birch, J.—The Local Legislature has, in section 102 of Act VIII. of 1869, substituted for the words "Zillah Judge," used in Act X. of 1859, the term "District Judge." This, in the General Clauses Act (I. of 1868), passed by the Government of India, is defined to mean "the Judge of a principal Civil Court of Original Jurisdiction." If these words are strictly interpreted, it may be said that, there being only one such Court in a district, it can refer only to the officer presiding in that Court, and that the bar to appeal contained in section 102 refers only to cases tried by him originally or in appeal. I do not think that such was the intention of the framers of the Act. In some of the most important districts, appeals under Act X. of 1859 had been for years disposed of by the Additional Judges. These officers were appointed under Regulation VIII. of 1833, and were empowered to perform any part of the duties of the Judge of the Zillah, and, in performance of those duties, were to exercise the same powers as the Zillah Judges. Appeals from the orders of the Additional Judges lay only to the Sudder, and subsequently to the High Court. This law was in force when Act VIII. of 1869 was passed by the Bengal Council, and I find nothing to indicate that the Local Legislature had any intention (if it had the power) to reduce the status of the Additional Judges to that of the Subordinate Judges as defined in Act XVI. of 1868, then in force. By Act VI. of 1871, Regulation VIII. of 1833 was repealed, but its provisions as to the powers of the Additional Judges are re-enacted in section 7, and since that enactment Additional Judges are gazetted as Additional District Judges, and the officer against whose judgment the special appeal was in this case preferred was so gazetted.

There have been conflicting decisions of this Court upon the question submitted. One, of the 27th February 1873, is reported

* *Vide* foot-note to next page.

at page 30, Volume X., B. L. R., App.* In that case it was held that section 102 referred to cases tried by a District Judge, and not to those tried by an Additional Judge, and the objection that an appeal would not lie was overruled.

In cases 768, 769, 770, 772, 773, and 774 of 1873, decided on the 28th of February 1873 by another Division Bench of this Court,* and not reported,† it appears that the appeals were dismissed upon the objection raised by the respondent that no appeal would, under the circumstances of the case, lie from the order of an Additional Judge.

It seems to me that there can be no appeal in cases decided by an Additional Judge, which would not be appealable had they been decided by the District Judge. I do not think that the Local Legislature contemplated any distinction being made between the Courts of the District Judge and Additional District Judge, and I would hold that the words District Judge in section 102 of Act VIII. of 1869 includes an Additional District Judge vested, under Act VI. of 1871, with powers of a District Judge.

Markby, J.—I concur in the construction which has been put upon the statute by Mr. Justice Birch.

Phear, J.—I concur in the view taken by Mr. Justice Birch, and have but a few words to add. It seems to me that, under the provisions of Act VI. of 1871, the Additional Judge is *a* District Judge, although, no doubt, not *the* District Judge; he is an Additional Judge attached to the Court of the District Judge. He has the same powers as the District Judge, although his cognizance of cases is in some degree limited. By Act VI. of 1871 a great distinction is made between the status of the Additional and that of the Subordinate Judge; there are no appeals from the decision of the Additional Judge to the District Judge, whereas, on the other hand, the Additional Judge may, as the Additional Judge of the District Judge's Court, hear appeals from the Subordinate Judge. I think that, shortly, the effect of section of Act VIII. of 1869 is to except decrees of an Additional Judge from ap under his character as a District Judg Additional Judge of the District Court.

Jackson, J.—I regret very much to myself under the necessity of dissenting my learned colleagues on this occasion. is only the very strong conviction on mind on a subject which I have frequ considered that induces me to express different opinion which I entertain.

Whatever the status of an Additi Judge may have been at the time of passing of Act VIII. of 1869, and previ to the passing of Act VI. of 1871, it see to me quite clear that the District Judg the Bengal Civil Courts Act of 1871 an entirely distinct person, and a per occupying a wholly different position in judicial body from the Additional Ju I think that, when the effect of a provis of law is to abridge the ordinary right appeal, that provision must be construed the utmost strictness, and that we ought to take away the right of appeal, unless are quite sure that the intention of law was to take it away.

Section 102 of Act VIII. of 1869 s that nothing in this Act shall be deemed confer any power of appeal in any s *tried and decided by a District Judg* originally or in appeal, if the amount su for, or the value of the property claimed, do not exceed one hundred rupees, in whic suit a question of right to enhance or va the rent of a ryot or tenant, or any questio relating to a title to land, or to some interes in land, as between parties having conflic ing claims thereto, has not been determine by the judgment. Section 3 of Act VI. 1871 provides that the number of Distri Judges to be appointed under this Act shal be fixed, and may, from time to time, be alter by the Local Government; and section says that, whenever the Governor-General in Council has sanctioned an increase of th number of District Judges, the Local Gov ernment shall appoint Additional District Judges. That, as I understand it, contem plates the case of an addition to the number of districts, and so regulates the appoint ment of Additional District Judges to fill that office in such additional districts. After that has been provided for, the Legisla ture in section 7 enables the Government in particular circumstances to appoint func tionaries called "Additional Judges," and it is declared that "such Additional Judges

* 19 W. R. 201.

† These were appeals from decisions passed by the Additional Judge of Hooghly, confirming, in appeal, the decision of the Moonsiff of Ghattal in that district, in a suit for arrears of rent under Act VIII. of 1869. On the appeal being called on before the High Court (*Present*: The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*), Baboo Bama Churn Banerjee, for the respondent, took the preliminary objection that no appeal could lie under s. 102, Act VIII. of 1869. After hearing Baboo Umbica Churn Bose for the appellant, the Court dismissed the appeal on the preliminary objection, with costs.

all perform any of the duties of a District Judge under Chapter III. of this Act as the District Judge may, with the sanction of the High Court, assign to them, and, in the performance of such duties, they shall exercise the same powers as the District Judge." Therefore the functions of an Additional Judge are restricted to performing, under deputation as it were from the District Judge, any of the duties of that officer under Chapter III. of that Act, and no further. The words, "exercise the same powers," I understand to mean that he shall exercise any such powers as are necessary for the efficient performance of his duties, and not as conferring any attribute such as immunity from appeal on the decisions of Additional Judges when passed. And throughout Act VI. of 1871, wherever grades of Courts are enumerated, Moonsiffs, Subordinate Judges, Additional Judges, and District Judges are all mentioned *seriatim* as officers of distinct status, holding separate positions, and exercising different powers. Indeed, section 102 of Act VIII. (B. C.) of 1869 had contained the words "decided by the District Judge or an Additional Judge," I should have readily admitted that the finality so given to the decisions of Additional Judges might be conceded to the officer with the same title, though holding a slightly different status created by Act VI. of 1871. But there are no such words in the section, and there appears to be quite sufficient reason why the Legislature should have intended to confer particular powers and particular finality of jurisdiction upon the District Judge in like manner as it confers certain special powers on the Collector of the District, although there may be other officers in the same district exercising the general powers of a Collector. The District Judge is usually an officer of greater experience, higher status, and longer connection with the district, and the Legislature might well have thought fit to say that in particular cases, usually of minor importance, the decision of such an officer might be allowed to be final. No such reason, it seems to me, exists in the case of the Additional Judge, and the Legislature, therefore, as I presume, did not include the Additional Judge in the terms of section 102.

For these reasons I think that whatever exemption from appeal is conferred by that section is limited to the decisions of District Judges.

Couch, C.J.—I am of opinion in this case that the appeal is barred. The question referred to us appears to have been decided by myself and Mr. Justice Glover about a year ago.* From my note of the case the question does not appear to have been argued—certainly, at no length—before us; but, after the argument which we have now heard, I retain the opinion which I expressed in that case.

Section 102 of Act VIII. of 1869 says: "Nothing in this Act contained shall be "deemed to confer any power of appeal in "any suit tried and decided by a District "Judge originally or in appeal, if the "amount sued for, or the *value of the "property claimed*, does not exceed one "hundred rupees, in which suit a question "of right to enhance or vary the rent of a "ryot or tenant, or any question relating to "a title to land, or to some interest in land, "as between parties having conflicting "claims thereto, has not been determined by "the judgment."

It appears to me on reading this section that the Legislature, in deciding whether there should be an appeal or not in the case there described, looked quite as much, probably more, to the value of the property claimed, and the question in dispute between the parties, than to the position of the Judge who was to decide the suit. It is not a proper way of ascertaining what was the intention, to look at the case merely as an appeal from a Judge having a particular status or holding, a particular rank or position among the Judges appointed under the Civil Courts Act.

Then we find that, in section 7 of the Civil Courts Act, provision is made for the appointment of Additional Judges when the business pending before any District Judge requires the appointment of an Additional Judge for its speedy disposal, and the Additional Judge so appointed is to exercise the same powers as the District Judge. I think we may assume that the gentleman appointed to exercise the same powers as the District Judge will be equally competent to exercise them, and that there is not a greater reason that his decision should be subject to appeal than the decision of the District Judge. We also find in section 21 of the same Act that his decisions are put by the Legislature on the same footing as the decision of the District Judge, for it says that appeals from the decrees and orders of District Judges and Additional

* See foot-note to previous page.

Judges shall, when such appeals are allowed by law, lie to the High Court.

I think (as I have already said) that, what should be looked at in considering the intention of the Legislature as to the right of appeal, are the powers which are to be exercised by the Judge and the nature of the suit, rather than whether he holds the office or possesses the dignity of a District Judge, or has only the name of Additional Judge. It appears to me, although differing as I do from a learned Judge of so much experience as Mr. Justice Jackson, I cannot but have some hesitation on the subject that an Additional Judge comes within the meaning of section 102 of Act VIII. (B.C.) of 1869, and that an appeal does not lie from his decision any more than from that of a District Judge.

The application for review will therefore be rejected.

The 5th March 1874.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Putnee Talooks—Sale for Arrears of Rent—Act X. of 1859, s. 105—Reg. VIII. of 1819—Reg. I. of 1820.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Brindabun Chunder Sircar Chowdhry and another

versus

Brindabun Chunder Dey Chowdhry and others.

A decree having been obtained by a zemindar for arrears of rent of a putnee talook, it was held that, under the description "putnee" and "dur-putnee," the *primâ-facie* intention was that the tenure called a putnee tenure was transferable by sale, and was one upon which the right to sell for arrears of rent was reserved in the engagements interchanged upon the creation of the tenure. Consequently, according to the effect of Act X. of 1859, s. 105, and Reg. VIII. of 1819, ss. 8 and 11, and probably also of Reg. I. of 1820, the sale of the putnee destroyed all incumbrances created by the putneedar, *e. g.*, a dur-putnee.

THIS is a suit for possession and mesne profits of a dur-putnee mehal brought against the zemindar. The charge is that the zemindar, in collusion with the heirs of Rutnessur Roy, who was said to be merely a benamee holder of the putnee talook, obtained a decree against them for Rs. 5,156 as arrears of rent of the said putnee, and that under that decree he sold the putnee, and, having purchased it in his own name, entered upon the estate of the dur-putneedar, treating the dur-putnee as having ceased to exist upon the sale of the putnee.

With regard to the fraud, their Lordships are of opinion that there is no sufficient evidence to satisfy a Court of justice that there was any fraud or collusion, between the zemindar and the heirs of Rutnessur, to allow the zemindar to obtain a decree against Rutnessur for arrears of rent which were not actually due. A strong fact against the supposition of fraud was this, that the zemindar originally sued the dur-putneedars for these arrears of rent. The dur-putneedars in that suit set up as a defence that Rutnessur was only a putneedar, and that they were merely the dur-putneedars of the mouzah, hence it was said, the plaintiffs' claim can be made against Rutnessur or his heirs, and not against them. Now, if the dur-putneedars at that time thought that the action ought to have been brought against the Maharajah of Kishenghur, for whom they said Rutnessur held the estate benamee, why did they not say so in their defence? They said Rutnessur is the person liable for these arrears, and you must sue him. Upon that the case went to trial in the Collector's Court; and the Judge who tried the case held that Rutnessur was only the putneedar, and therefore that the plaintiffs could not sue the dur-putneedars, and dismissed the suit with costs, whereupon the zemindar brought an action against the heirs of Rutnessur for the arrears of rent, and it is that suit which is now charged as having been brought by collusion between the zemindar and Rutnessur for the purpose of injuring the dur-putneedars by fraudulently obtaining a decree for rent which was not due, and then selling the putnee, and avoiding the incumbrance of the dur-putnee.

There being, then, no fraud in the case, the question arises whether, upon the sale of the putnee under the decree for rent, it was sold free from the incumbrances which had been created by the putneedar, or,

* From the judgment of Bayley and Phear, JJ., in Regular Appeal No. 188 of 1866, decided on the 7th December 1867—8 W. R. 507.

ther words, whether it was sold free from e dur-putnee. That depends upon the construction of section 105 of Act X. of 1859. hat section enacts: "If the decree be for n arrear of rent due in respect of an under-enure which, by the title-deeds or the ustom of the country, is transferable by ale, the judgment-creditor may make pplication for the sale of the tenure, and he tenure may thereupon be brought to sale n execution of the decree, according to he rules for the sale of under-tenures for he recovery of arrears of rent due in espect thereof, contained in any law for the ime being in force." It has been held, on the construction of those words, ccording to the rules for the sale of under-ures," that the effect of Regulations VIII. 1819 and I. of 1820 is applicable to cases sales under decrees of rent made under s section 105; and then the question es whether this was a sale for an arrear f rent due in respect of an under-tenure hich, by the title-deeds or the custom of he country, is transferable by sale."

The plaintiff in his plaint describes the ure as a putnee talook, and his own tenure a dur-putnee, and the point is whether, der the description of "putnee and dur-nee," it is to be presumed that the putnee ure was one such as is described as the ure denominated a putnee by Regulation III. of 1819. In the preamble of that gulation—which, as contended for by the rned Counsel, it must be admitted, is not enactment, but merely a recital—it is said: By the terms of the engagements interchanged, it is, amongst other stipulations, provided that, in case of an arrear occurring, the tenure may be brought to sale by the zemindar, and, if the sale do not yield a sufficient amount to make good the balance of rent at the time due, the remaining property of the defaulter shall be answerable for the demand. These tenures have usually been denominated putnee talooks."

Their Lordships are of opinion that, under e description "putnee talook" and "dur-nee talook," it must be *primâ facie* tended that the tenure called a putnee tenure s a tenure transferable by sale, and, upon e creation of which, it was stipulated by e terms of the engagements interchanged at, in case of an arrear occurring, the ate might be brought to sale. If so, ccording to the terms of Regulation VIII. of 819, the tenure might not only be brought sale, but it might be sold free from incumbrances. By section 8 of Regulation VIII., it is enacted: "Proprietors, under direct "engagements with the Government, shall "be entitled to apply in the manner follow-"ing for periodical sales of any tenures upon "which the right of selling or bringing to "sale"—not the right of selling or bringing to sale free from incumbrances, but—"upon "which the right of selling or bringing to "sale for an arrear of rent may have been "specially reserved by stipulation in the "engagements interchanged on the crea-"tion of the tenure." Then, by section 11, the effect of such a sale is stated as follows: "It is hereby declared that any talook "or saleable tenure that may be disposed of "at a public sale under the rules of this Regu-"lation for arrears of rent due on account of "it is sold free from all incumbrances that "may have accrued upon it by act of the "defaulting proprietor, his representatives "or assignees, unless the right of making "such incumbrances shall have been expressly "vested in the holder by a stipulation to "that effect in the written engagements "under which the said talook may have been "held."

It appears therefore to their Lordships that this was the sale of a talook transferable by sale, and upon which the right to sell for arrears of rent was reserved in the engagements entered into by the parties. Consequently, according to the effect of section 105 of Act X. of 1859 and sections 8 and 11 of Regulation VIII. of 1819, and probably also of Regulation I. of 1820, the effect of the sale of the putnee talook was to destroy all incumbrances which had been created by the putneedar, and consequently to destroy the particular incumbrance which is mentioned in the plaint in this suit, namely, the dur-putnee of the plaintiff.

Their Lordships, therefore, think that the suit was not maintainable, and that the learned Judges of the High Court did not probably give sufficient effect to the recital of the preamble of Regulation VIII. of 1819 and the enactments of that Regulation, in holding that it did not appear that the putnee was a tenure upon which the right to sell for arrears of rent had been reserved by the contract of the parties.

Under these circumstances, it appears to their Lordships that the decision of the High Court was not correct, and they will therefore humbly recommend Her Majesty to reverse that decision, and to affirm the decision of the Principal Sudder Ameen, with the costs of this appeal.

The 9th March 1874.

Present:

The Hon'ble C. Pontifex and E. G. Birch, *Judges.*

Remand—Appeal—Putnee Sale—Regulation VIII. of 1819, s. 11—Rent-suit—Jurisdiction.

Case No. 881 of 1873.

Special Appeals from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 21st January 1873, reversing a decision of the Deputy Commissioner of Maunbhoom, dated the 6th July 1872.

Magaram Ojha and others (Defendants), *Appellants,*

versus

Rajah Nilmonee Singh Deo (Plaintiff), *Respondent.*

Baboo Chunder Madhub Ghose for Appellants.

Baboo Bhowanee Churn Dutt for Respondent.

The omission of a party to prefer an appeal against an order of remand does not preclude him from questioning its legality when it comes up in special appeal from the subsequent decision passed after remand.

The purchaser at a putnee sale is not empowered to collect rent at a higher rate than was demandable by his predecessor without establishing his right to do so by a regular suit.

In a suit by such purchaser to recover arrears of rent, where the issue framed was simply from whom, and to what extent, could plaintiff recover rent, the first Court was held to have done wrong in expressing an opinion that notice should have been issued under Act X. of 1859, s. 13.

Birch, J.—The plaintiffs sued to obtain arrears of rent from the defendants for part of 1274 and the whole of 1275 and 1276 at a yearly rent of Rs. 210-8-11. The defendants who appeared pleaded that they held their tenure at a fixed quit-rent of Rs. 88-1, and produced a copy of a judgment in a suit for the rent of 1267, in which, as between them and the putnee talookdar was declared that the rent payable by th was Sicca Rs. 82-10, equal to Compa Rs. 88. The Deputy Commissioner h that the defendants' plea was made good, gave the plaintiff a decree for the admitted by the defendants who had appea Against those who had not appeared, *ex-parte* decree for the amount claimed the plaintiff was passed. Upon an app being preferred to the Judicial Commissio he remanded the case, as he considered there was not sufficient evidence to en him to determine whether the jumma Rs. 210-8-11 as alleged by the plaintiff, Rs. 88-1 as alleged by the defenda Upon remand, no further evidence adduced, and the Deputy Commissio affirmed his former decision. An appeal again preferred to the Judicial Commissio and he reversed the decision of the lo Court, and gave the plaintiff a decree for full amount claimed, with costs and inte

Against that decision the special appe preferred, and it is contended that Judicial Commissioner's order of remand illegal, and ought to be set aside; and furt that his judgment, reversing the order of Deputy Commissioner passed on remand based on an erroneous interpretation of law.

We think that the objection to the rema order can be entertained now. It is t that the special appellants might have p ferred a special appeal to this Court aga the order of remand, but we are not prepa to say that their omission to prefer an app against that order precludes them fr questioning its legality, when the case co up in special appeal from the subseq decision passed after remand.

The Judicial Commissioner was, we thi wrong in law in remanding the case, as did, by his order of the 30th January 187 Section 352 expressly limits the power the Appellate Court to remand, and says th it is not competent to remand a case for second decision, except as provided by secti 351. The provisions of the latter secti cannot apply in this case, as it is appar that the lower Court went into eviden upon the whole case, and did not dispose it in the first trial upon any preliminary po It investigated the merits of the case, a passed its judgment upon the evidence. Th being so, the Judicial Commissioner was n authorized to remand the case.

In the judgment containing the order remand, the Judicial Commissioner has he

he plaintiff by his re-purchase of the
x he had granted in putnee to Unnoda
ad reverted *ipso facto* to the position
ld as proprietor, and is entitled to recover
from the tenants at the rate he was
ing when he granted the putnee with-
eference to the amount realized by the
dar in the interim. Clauses 1 and 3 of
n 11, Regulation VIII. of 1819, are
as vesting the purchaser with such
rs. We think that the section quoted
t bear the interpretation put upon it,
hat there is no provision in the putnee-
hich gives the purchaser at a putnee-
he power to collect rent at a higher
han was demandable by his predecessor
ut establishing his right so to do. The
lause expressly provides that engage-
entered into by a putneedar with ryots
g certain defined rights shall not be
lled by a purchaser at a putnee-sale
t by a regular suit, clearly showing that
utnee-law does not give a purchaser the
rdinary power the Judicial Commis-
r assumes it to give. Such a purchaser
in a suit for arrears of rent, demand
what was payable to his predecessor,
he establishes his right to change the
gement previously subsisting.
oking to the form of the suit as origin-
aid, and the simple issue framed therein—
m whom and to what amount can the
iff recover rent"—we think that the
ial Commissioner should not, in the order
mand, have found that the tenure was a
rajee brahmittur holding at a fixed
" or declared that "this is not a case in
notice, under section 13, Act X. of
could issue." All that could be decided
suit framed as this was would be
was the rent payable in the years
diately preceding that for the arrears of
the suit was brought. The Deputy
missioner has expressed an opinion that
e should have been issued under section
Act X. of 1859. That expression of
on might, if allowed to remain unnoticed,
dice the defendants in any future
tion. While, therefore, we are of
on that the decree of the Judicial
missioner is wrong in law, and must be
side, and the order of the Deputy
missioner restored, we must express our
on that the remark in the judgment of
Deputy Commissioner as to the applica-
f section 13, Act X. of 1859, should not
been made, and must not be considered
termining the status of the defendants
have appealed.

We reverse the order of the Judicial Commissioner, and restore that of the Deputy Commissioner to the extent of declaring that the sum due to the plaintiff from the defendants who have appeared is Rs. 35-8-9. We observe that an *ex-parte* decree has been passed against the owner of 13½ annas of the village; that portion of the decree remains untouched.

As the appellants might have appealed against the order of remand, and by so doing stayed further proceedings, we think that they are not entitled to the costs of this Court. Each party must bear his costs in this appeal.

The 16th March 1874.

Present:

The Hon'ble Sir Richerd Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, Louis S. Jackson, W. Markby, and W. Ainslie, *Judges.*

Ex-lakhirajdar's Right to Settlement—Jurisdiction—Parties.

Case No. 882 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 28th December 1872, affirming a decision of the Subordinate Judge of that District, dated the 1st April 1872.

Mahomed Israil (Plaintiff), *Appellant*,

versus

Mr. J. P. Wise (Defendant), *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Mr. J. H. A. Branson for Respondent.

In a suit for possession of land by adjudication of the right to settle, where plaintiff alleges that he is the rightful owner of the lands which have been resumed by the Government, but that the defendant, by false allegation of ownership and of possession, induced the Revenue Authorities to enter into settlement with him, plaintiff is entitled to an adjudication of his right to settlement.

It is not discretional with the Collector, under such circumstances, to settle the lands with any person he pleases, nor is such settlement final as regards all claims:

HELD (Markby, J., expressing no opinion) that, in a suit like the present, the Government ought to be made a party.

This case was referred to the Full Bench on the 28th August 1873 by Jackson and Mitter, JJ., with the following remarks:—

Jackson, J.—THE decision of the Lower Appellate Court in this case is based on the authority of the decision of a Division Bench in Special Appeal No. 1622 of 1867, of which the original judgment has not been reported,* but the judgment of the learned Judges upon an application for review is printed in 10 W. R., page 296. It is the case of Phekoo Singh and others against the Government and others. In that case it was held that there was nothing in the Regulations which absolutely entitled an ex-lakhirajdar to the settlement of lands resumed by the Government under Regulation II. of 1819, and holding [illegible] view of the law the learned Judges dismi[ss] the appeal, carrying with it the dismissa[l] the suit of the plaintiffs. In the judg[ment] first delivered, the late Mr. Justice Bay[ley] whose opinion on a question of Revenue L[aw] is entitled to great respect, declares [that] under Regulation II. of 1819, "the Gove[rn]ment becomes the actual proprietor of [the] resumed mehal, just as much as it would [do] in the case of an escheat of a Governm[ent] purchased mehal." Mr. Justice Macpher[son] coming to the same conclusion, declared [that] he rested his decision upon the reasons gi[ven] by Mr. Justice Norman in the case of Ma[ha]rajah Joy Mungul Singh *vs.* Tekait Pokha[run] Singh, in 7 W. R., page 465; and [on] the review, Mr. Justice Macpherson ag[ain] stated that his reasons had been stated in [the] judgment delivered at the hearing of [the] appeal, and he saw no reason to alter [his] opinion then formed. Now, in respect [to] that view of the case, it appears to me, [we] great deference to the opinion of the lear[ned] Judge, that the circumstances of the case [in] the 7 W. R. were very different from th[ose] of the case then before the Court. Mr. J[us]tice Norman was dealing, as he underst[ood] it, with the case of resumed altumgha mud[dad] mash or the like, which is a resumption [of] land granted either for service purposes [or] as a recompense. In that case the l[aw] might fairly be held to return to the Gove[rn]ment which granted it. In this case it [is] altogether different. But the judgment [of] Mr. Bayley on the review in the 10 W. [R.] refers to Regulations which do undoubte[dly] bear upon this point. As to Regulation XI[X] of 1793, Mr. Justice Bayley states that [in] his opinion there is nothing in the terms [of] sections 7, 8, or 17 which provide that set[tle]ment must, as a matter of course, be m[ade] with the ex-lakhirajdar. The pleader [for] the respondent before us to-day admitted th[at] he was not prepared to support the decisi[on] of the Division Bench on which the Low[er] Appellate Court relied in this case, and [it] seems to me, as at present advised, that th[at] decision is not one which can be supported. It appears to me that, under Regulation II. o[f] 1819, and on the provisions of the Regula[-] tions of 1793, which have been referred to, the question for the Revenue Authorities is whether or not the land in question ought to be assessed for the purpose of revenue to Government. Of course, in determining that question, the Revenue Authorities are justified in dealing, and must necessarily deal, with the parties whom they find in possession

* The 8th June 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Case No. 1622 of 1867.

Special Appeal from a decision passed by the Judge of Gya, dated the 18th April 1867, reversing a decision of the Principal Sudder Ameen of that District, dated the 31st July 1866.

Phekoo Singh and others (Plaintiffs), *Appellants,*

versus

The Government and Moharajah Joy Perkash Singh and others (Defendants), *Respondents.*

Messrs. R. T. Allan and *R. E. Twidale* and *Baboos Onoocool Chunder Mookerjee* and *Kishen Succa Mookerjee* for Appellants.

Mr. C. Gregory and *Baboo Mutty Lall Mookerjee* for Respondents.

Macpherson, J.—IT appears to me that the judgment of the lower Court is right, and the reasons which led me to this conclusion are substantially the same as those given by Mr. Justice Norman in the case of Maharajah Joy Mungul Singh *vs.* Tekait Pokharun Singh (7 W. R., p. 465).

The circumstances of this case are similar to the circumstances of that case, and I am quite prepared to follow the decision then arrived at, and think that this appeal must be dismissed with costs.

Bayley, J.—I also think that, for the reasons given by Mr. Justice Macpherson, the appeal should be dismissed with costs. Under Regulation II. of 1819 the Government becomes the actual proprietor to the resumed mehal, just as much as it would do in the case of an escheat of a Government purchased mehal.

It is true that the Legislature has given the Government the power to confer certain privileges on the ex-lakhirajdar and others. But there is no law that I am aware of enacted that Government is bound, in all cases and under all circumstances, to divest itself of all proprietary right, or to preclude itself from making such arrangements as it made in this case with reference to the circumstances and position of the parties.

ORDERED:—

That this appeal be dismissed with costs.

he land, but I conceive that beyond the stion of liability to assessment, which is lly within the decision of the Revenue horities, the question of proprietary right s with the Civil Court, and that a party whom settlement is not made, and who siders himself entitled to settlement, may g a suit in the Civil Court to have his t to settlement declared. This being present view of the matter, and the stion being one of considerable import-e, which at any rate requires a fuller and e authoritative decision, I think this er should be referred to the Full Bench. question will be, whether, on the allega- by the plaintiff that he is the rightful er of the lands which have been resumed he Government, but that the defendant false allegation of ownership and of pos-ion has induced the Revenue Authorities ter into settlement with him, he is enti- to an adjudication of his right to settle-t, or whether it is discretional with the lector under such circumstances to settle lands with any person he pleases, and settlement is final as regards all claims.

Mr. Branson, for the respondent, being ed upon first by the Court, submitted the case of Phekoo Singh *vs.* The Gov-ment, which was decided by the late Justice Bayley, and concurred in Mr. Justice Macpherson, reported in Weekly Reporter, page 296, was a correct sion, and ought to be followed in the pre- instance.

n that case it was held that there was hing in the Regulations which absolutely led an ex-lakhirajdar to the settlement lands resumed by the Government under ulation II. of 1819. In the case of arajah Joy Mungul Singh *vs.* Tekait hun Singh, the same thing was decided. Justice Seton-Karr in page 467 says:— either in the above laws, nor in any her, do we find any provision recogniz-g the absolute and indefeasible right of lakhirajdar or jagheerdar whose lands d been resumed to the settlement. A scretion appears to have been vested in e Government to deal with the former ner or the occupant, as it might think , and though, admittedly, the general le of the Revenue Authorities has been at setulement should be offered, at half mma, to the rent-free holder or jagheer-r whose tenure had been resumed, it is where shown that the Revenue Author-es were bound to recognize that right, "or admit the old proprietor to settlement "under all circumstances whatever."

In the present case, therefore, the appellant is not entitled to an adjudication of his right to settlement.

Baboo Gopal Lall Mitter, for the appellant, was not called upon.

The judgments of the Full Bench were delivered as follows:—

Couch, C.J.—(*Kemp, Jackson*, and *Ainslie, JJ.*, concurring).—I think the first branch of the question must be answered in the affirmative. If we look at the scope and object of these Regulations, I do not see how it could be supposed that the decision in a suit for assessment would do anything more than affect the question whether the land was to be held rent-free or not. In determining that question between the owner or occupier of the land and the Government, it was not intended to determine any rights between parties who might have conflicting claims to hold the land.

In the Sudder Reports of 1850, page 407, this appears to have been decided. The judgment there is: "In this case the right of "plaintiff as proprietor has been admitted by "the Moonsiff, on proof of the foreclosure of "the mortgage, previous to the purchase of "the defendant, with whom the settlement "was made by the Collector in virtue of his "being in possession. Both Courts, however, "on the precedent of Hur Gobind Ghose "(Summary Decisions, Sudder Dewanny "Adawlut, pp. 109-10-11-12) have consi-"dered themselves restricted from interfer-"ing with any settlement made by the "Revenue Authorities, and therefore dis-"missed plaintiff's claim.

"In this opinion both Courts have mis-"taken the decision in the precedent cited. "It is therein recorded, 'to decide on the "question of assessment is peculiarly the "province of the Resumption Courts; to "decide on the question of proprietary right "is peculiarly the province of the Judicial "Courts.' Thus, in the case of a suit to "resume a lakhiraj tenure, the Resumption "Courts would pronounce upon the validity "or invalidity of the tenure; but the Civil "Courts might still entertain a suit between "parties claiming the proprietary right, and "desirous of being admitted to enter into "the settlement with Government." This is also the view which was taken by Mr. Justice Paul in the case in 16 Weekly Reporter, page 35; and the Judicial Committee of the Privy Council in their judgment in Gunga Gobind Mundul *vs.* The Col-

lector of 24-Pergunnahs, 11 Moore's Indian Appeals, page 358,* distinctly state this to be the law. In that judgment it is said:—"If, as the Government contend, these lands "were rent-paying lands, the title of the "Government was simply to the rent, the "nature of which was that of a jumma or "tribute; and if the holders of these lands "asserted then, or subsequently, a ground-"less claim to hold them free of rent, as "lakhiraj, that claim would not destroy "their proprietary right in the lands them-"selves, but simply subject their owners to "liability to be sued in a resumption suit, "the object of which is not to obtain a "forfeiture of the lands, but to have a "decree against the alleged rent-free tenure, "involving the measurement and assessment "of the lands, and the liability of the person "in possession, if he wishes to retain posses-"sion, to pay the revenue so assessed." Therefore, we should answer the first part of the question in the affirmative. The question is put in such a way that the first of it must be answered in the affirmative and the second in the negative.

It appears to me that there has been an error in the proceedings in holding that the Government was not a proper party to the suit. The Government having given a lease of the lands to another person, it was proper that it should have an opportunity of showing that this had been properly done. If the Government were a party to the suit, the person who got the lease from the Government might be freed from liability upon it. Now another suit will be necessary to finally decide the matters between these parties, as the Government being no party to this suit will not be bound by the decision in it.

The decree of the Lower Appellate Court must be reversed, and the case must be remanded to that Court for re-trial. The defendant is in possession under a lease from the Government, and the Government should be made a party to the suit in order that (if it is clear that the plaintiff is entitled to the lease) the defendant Wise may be released from liability.

Markby, J.—Upon the point referred I concur in the judgment delivered by the Chief Justice. Upon the question whether in a suit like the present it is necessary to make Government a party, I do not consider it necessary to express any opinion, as that point is not mentioned in the order of reference.

* 7 W. R. (P. C.) 21.

The 16th March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Mor
Judges.

Act VIII. of 1859, s. 284 et seq.—Execution—Jurisdiction—Limitation.

Case No. 393 of 1873.

Miscellaneous Appeal from an order pas by the Officiating Judge of Purne dated the 8th September 1873, reversi an order of the Moonsiff of Kish gunge, dated the 8th July 1873.

Lootfoollah (Judgment-debtor), *Appella*

versus

Keerut Chund (Decree-holder), *Respond*

Moonshees Mahomed Yusoof and *Abdo Baree* for Appellants.

Baboo Doorga Mohun Doss for Respondent.

The Court to which, under Act VIII. of 1859, s. and the following sections, a decree is transferred the purpose of being executed, does not thereby acq a jurisdiction to entertain and determine a questio regard to limitation or otherwise which arose bet the parties antecedent to the date of transfer.

Where such transfer is made without the knowled of the judgment-debtor, his remedy is to apply to Court to which the decree has been transferred to s proceedings until he can go to the original Court for full remedy.

Phear, J.—We do not think that in th case we ought on special appeal to interfe with the decision of the Lower Appell Court, because it appears to us that it is effect right. At the same time we feel th we ought to say that in our judgment bo the Lower Appellate Court and the Court the Moonsiff of Kishengunge were wrong entertaining and determining the objecti which the judgment-debtor made to th execution of the transferred decree.

We are informed, for the fact does n appear in the judgments of either of th lower Courts which have come up to us that the decree or order which is sought this case to be enforced was passed by th Moonsiff's Court of Purneah. The origin decree-holder was one Aughori Biswas, an the date of the decree was the 19th Febru ary 1864. Some years after this date namely, in February 1871, one Hisarut Al purchased the decree from Aughori Biswa and got his name substituted for that o

ghori as decree-holder, or at any rate
de an application to the Purneah Court
that purpose and also for realization of
decree. He did not succeed in realizing
decree; there is perhaps some doubt
ther he ever seriously attempted to do so
ot. And he in his turn sold the decree
the present respondent before us, one
erut Chund; and eventually Keerut
nd obtained an order from the Moonsiff
Purneah to transfer the decree to the
nsiff of Kishengunge for execution.
en the case came in this way into the
nsiff's Court of Kishengunge for execu-
, the judgment-debtor objected that it
barred. And the Moonsiff of Kishen-
ge sustained his objection. But on
al preferred by Keerut Chund to the
ge, the objection was overruled by the
ment which is now specially appealed
to this Court.

We have lately had occasion to express
views with regard to the scope of sec-
284 and the following sections of the
l Procedure Code,* and to show that in
judgment the Court to which a decree
nder those sections transferred for the
ose of being executed, does not thereby
ire a jurisdiction to entertain and deter-
a question with regard to limitation or
rwise which arose between the parties
cedent to the date of transfer. By
on 287, merely "the copy of any
cree, or of any order for execution when
d in the Court to which it shall have
en transferred for the purpose of being
cuted as aforesaid, shall for such pur-
e have the same effect as a decree or
er for execution made by such Court."

d under the terms of these sections
ng more than a copy of the decree or
for execution, together with a certifi-
of how much is due from the judgment-
or to the judgment-creditor, ought to go
e Court which is called upon to execute
decree in this manner. And if nothing
e than these materials were sent, it is
ous that the Court would have no means
tertaining and determining the question
h rests upon the proceedings which had
red previously to the transfer of the
ee. And section 290 provides for any
venience or injustice which might as a
equence of this accrue to the judgment-
or, by enacting that "the Court to
ich such application is made may, upon
od and sufficient cause being shown, stay
"the execution of the decree for a reason-
"able time, to enable the defendant to apply
"to the Court by which the decree was
"passed, or to any Court having appellate
"jurisdiction in respect of the decree or the
"execution thereof, for an order to stay the
"execution, or for any other order relating
"to the decree or the execution thereof,
"which such Court of first instance or
"Court of appeal might have made, if execu-
"tion had been issued by such Court of first
"instance, or if application had been made
"to such Court.* *"

For instance, as has been in the argument before us represented to have occurred in the present case, it might happen that the judgment-creditor or his representative had obtained a transfer of the decree for execution to a foreign Court without causing any notice whatever of his claim or of his intention of asking for the transfer to be given to the judgment-debtor; and it might further happen that the judgment-debtor would for the first time, after the transfer of the decree, discover that proceedings in execution were being taken against him which had been long ago barred by process of time, or for any other sufficient cause: section 290 in such a case provides the very remedy which the judgment-debtor wants by enabling the Court to which the decree has been transferred, on his representation and on the facts being made apparent by him, to stay the execution until he can go to the original Court for his full remedy.

If there is any foundation for the argument which has been preferred to us by the judgment-debtor, he ought to have asked the Moonsiff of Kishengunge to stay proceedings in order that he might go to the Moonsiff of Purneah for his remedy. But if he did not take a step of this kind, or make an objection to this effect, then the Moonsiff of Kishengunge had no alternative but to execute the copy decree which came to him under the authority of the Moonsiff of Purneah, and the order for execution, if there was any, which the Purneah Moonsiff sent to him. He ought not, upon the footing of the copy decree, to have proceeded to inquire into the state of the facts between the parties antecedent to the date of transfer. And the same would be the case with the Judge. But in fact the Judge has passed a judgment which amounts to refusing to go behind that date. He has directed that execution should issue. For this reason we think that we ought not to interfere.

The appeal must be dismissed with costs.

* *Ante*, page 292.

The 16th March 1874.

Present:

The Hon'ble E. G. Birch, *Judge.*

Ejectment—Notice.

Case No. 1446 of 1873.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 8th February 1873, affirming a decision of the Moonsiff of Tumlook, dated the 28th November 1872.

Komul Sanguth (Defendant), *Appellant,*

versus

Romanath Gossamee (Plaintiff), *Respondent.*

Baboo Kalee Kishen Sen for Appellant.

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Respondent.

Quære.—Can a zemindar eject a ryot not having a right of occupancy without giving any notice?

IT is contended in special appeal in this case that the Judge has not adjudicated upon an important point raised before the Moonsiff, namely, as to whether notice had been given to the defendant to quit the tenure. Upon this point the Moonsiff says in his judgment:—"Notice has been given him (that is, the defendant), and he must quit at the bidding of the plaintiff." It has been said here that this point was not pressed before the District Judge, but I find that this objection was raised to this finding of the Moonsiff in the grounds of appeal. The Judge states in his judgment that "the zemindar has the power to eject a non-occupant ryót of this description even if there was no arrear at all." What the Judge had to consider and determine first of all was whether the notice had been given, and within a sufficient time. As it appears to me that the Judge has not considered this point, I am compelled to remand this case. As the case now stands, I am not in a position to say whether I can support the dictum of the Judge that the zemindar can eject any ryot not having a right of occupancy without giving any notice. The consideration of that point must, if it become necessary, be deferred until there is a finding by the Judge upon the point whether the notice was duly served in this case, and whether such notice was sufficient.

The case will, therefore, be remanded to the Lower Appellate Court, and the costs will abide the ultimate result.

The 17th March 1874.

Present:

The Hon'ble W. Markby and E. G. B
Judges.

Admission by Vakeel.

Case No. 1324 of 1873.

*Special Appeal from a decision passed
the Judge of Midnapore, dated the
April 1873, reversing a decision of
Moonsiff of that District, dated the
December 1871.*

Sreemutty Dossee (Plaintiff), *Appellan*

versus

Pitambur Pundah (Defendant), *Respond*

Mr. G. Gregory and *Baboo Bhowani
Churn Dutt* for Appellant.

Baboos Rash Beharee Ghose and *Bhyr
Chunder Banerjee* for Respondent.

A distinct admission of liability made by a v
who represented the defendant, and whose auth
was not questioned, was HELD to be sufficien
warrant a decree in favour of the plaintiff.

Markby, J.—IN this case we think t
the judgment of the Lower Appellate C
must be reversed. It appears from
judgment of the Moonsiff that upon
admission having been made by the va
of the only defendant who resisted
plaintiff's claim, he considered that all c
tention was at an end; and that the dec
must be given for the amount claimed.
Judge says as to that that the admission
the vakeel which is referred to by the
Court is not an admission of liability.
have the admission before us which is
writing, and feel compelled to say that
consider that it is a distinct admission
liability, and the circumstances under wh
the admission was made make that perfe
clear; because the admission was made
consequence of a summons issued at
instance of the plaintiff to this very defe
ant to come into the Court and g
evidence. We think that the vakeel w
represented this defendant, and whose auth
ity has in fact never been questioned,
made an admission of liability; and
upon that admission the suit was prope
decreed by the first Court. In this view
the case, we think it unnecessary to go in
the evidence as to the legality of t
demand. The demand was not illegal
the sense of being one which is prohibit

h

law. The liability of the parties would end upon the arrangement entered into ween themselves, and that is covered by admission made by the vakeel. Mr. gory admits, however, that the plaintiff ot entitled to recover the whole of the ess poolbundi against this sharer alone; can only recover that which has been d by her on behalf of this defendant, ely, 144 rupees 4 annas 10 gundas, with rest at 6 per cent. from the date of ment to the date of realization.

he plaintiff will get a decree accordingly, she will also get her costs of this appeal of the Lower Appellate Court.

The 19th February 1874.

Present:

e Hon'ble J. B. Phear and G. G. Morris, *Judges.*

ellate Court—Issues—Lotbundee—Secondary Evidence.

Case No. 1049 of 1873.

cial Appeal from a decision passed by the dditional Subordinate Judge of Sarun, ated the 4th March 1873, reversing a ecision of the Moonsiff of that District, ated the 2nd August 1872.

ussamut Ustoorun (Plaintiff), *Appellant,*

versus

boo Mohun Lall (one of the Defendants), *Respondent.*

Baboo Doorga Doss Dutt for Appellant.

Mr. R. E. Twidale for Respondent.

Lower Appellate Court is not justified in deter-g an appeal upon an issue which was not raised een the parties in the Court of first instance.

lotbundee cannot be accepted as secondary evidence u of the certificate of sale, unless the absence of the icate is sufficiently accounted for, and no better nce than the *lotbundee* can be produced.

Phear, J.—We think in this case that, if view of the facts expressed by the Sub-nate Judge be taken to be the true view, the decision of the Lower Appellate rt is a perfectly good decision. In other ds, if the plaintiff, after having bought property which is the subject of suit at first execution-sale, had herself, in further cution of the decree, caused the same perty to be set up for sale, and the ndant had bought it at that sale, she ld be estopped from seeking to recover this property from the defendant upon the footing of her own prior title by purchase. For, by putting up the property for sale in execution of the decree which she had obtained against Lalljee, she represented that it was his property liable to be taken in execution under the decree which she had obtained against him, and she ought, therefore, to be prevented from afterwards saying that that representation was wrong.

But we find that there was no issue upon this point raised in either of the lower Courts. And, perhaps, in consequence of its not having been raised, the best evidence available for the determination of the issue was not, before the Court. The defendant did not in the first Court, or at any time during the trial, allege that this property, which the plaintiff is now seeking to recover, is the same property as that which she had caused to be sold under the second execution-sale. If he had made this allegation, and an issue had been duly raised upon it, then, in order to establish the affirmative of it, he would have been obliged to put into Court the certificate of sale which was his title-deed. We need hardly say that the *lotbundee* would not be accepted as secondary evidence in lieu of the certificate of sale, unless the absence of the certificate of sale was sufficiently accounted for, and no better evidence than the *lotbundee* could be produced.

We think that the Subordinate Judge was wrong in determining the appeal which was before him upon an issue which had not been raised between the parties in the Court below. And having regard to the nature of the evidence upon which he determined it, we are quite unable to judge whether he has even come to a probably correct view of the facts relevant to this issue. It is quite possible, so far as the terms of the *lotbundee* go, that the property, or rather the share of the property which was sold on the occasion of the second auction-sale, was the other half of the property, and not the half which the plaintiff herself had first bought, and which she seeks to recover in this suit. But, however this may be, we express no opinion on the point.

For the reasons which have already been mentioned, we think that the decision of the Lower Appellate Court is bad, and must be reversed, and the case must be remanded to that Court for re-trial.

The costs will abide the event.

We may add that, if the Subordinate Judge is of opinion that this issue does properly

arise upon the plaint and the written statement, and that it ought to have been framed between the parties by the first Court, then he has the power of directing the first Court to try that issue under section 354.

The 5th March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Religious Endowment—Reversionary Rights—Legal Necessity—Invalid Conveyance.

Case No. 777 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 7th January 1873. modifying a decision of the Sudder Moonsiff of Mozufferpore, dated the 31st July 1872.

Joy Lall Tewaree and others (some of the Defendants), *Appellants,*

versus

Gossain Bhoobun Geer (Plaintiff) and others (Defendants), *Respondents.*

Baboos Kalee Prosunno Dutt, Hem Chunder Banerjee, and *Chunder Madhub Ghose* for Appellants.

Mr. R. E. Twidale and *Baboo Nil Madhub Bose* for Respondents.

In a suit to set aside the sale of property belonging to a religious endowment, the Moonsiff gave plaintiff a decree in favour of his reversionary rights, declaring that the conveyance should not operate adversely to him to the extent of such portion as was sold to meet pressing debts and necessities of the muth:

HELD that such a decree was erroneous, as the transaction of sale was one and indivisible. If the sale was valid, plaintiff was not entitled to have it set aside to any extent; but, if the conveyance was not operative against the plaintiff, it should have been set aside in its entirety either absolutely or upon condition that plaintiff should repay such portion of the consideration-money as had been rightly advanced:

HELD that the plaintiff had no right to sue the purchaser of the property, unless he could show he had a right in the property, and that the conveyance on which he sued did not pass to him any right, present or reversionary, in the property, as his suit should have been dismissed.

Phear, J.—THE plaintiff brings this against one Mohunt Hunooman Geer, denominated defendant 1st party, and several other persons denominated defendants party, in order to have a sale of certain property, which the defendant 1st party sold to the defendants 2nd party, set aside.

The plaintiff alleges that this property together with other property, was left by Mohunt Imrit Geer, the gooroo and ancestor of the plaintiff; that the said mohunt during his lifetime, appointed the plaintiff as his chela and heir according to the custom and practice prevalent among the sect of mohunts; that, after the death of the gooroo, which took place on the 1st Sawun 1275 Fuslee, the plaintiff, being the chela and legal and rightful heir of the deceased mohunt, filed a petition, under Act XXVII. of 1860, for obtaining a certificate of heirship, but was opposed in this application by the defendant 1st party, the nephew of the deceased mohunt; that in consequence of this opposition to his claim for a certificate, some negotiations took place between them, and ultimately a deed of compromise was come to between the plaintiff and the defendant 1st party, to the effect that the defendant 1st party should remain in possession of the guddee of the mohunt during the term of his life without wasting any property belonging to the muth, while the plaintiff should be the manager of the muth during the lifetime of the defendant 1st party; and that, after the death of the defendant 1st party, the plaintiff should become the absolute owner of all the real and personal properties and estate appertaining to the *asthul* as the heir of his deceased gooroo.

And the plaintiff further alleges that, by virtue of this deed of compromise, the defendant 1st party entered upon possession of the property left by the deceased gooroo—that is, the plaintiff's gooroo and ancestor, and within a short time sold an 8-annas share of the mouzah in dispute and the shares in other mouzahs belonging to the *asthul* worth Rs. 22,600—which is entered as consideration-money in the invalid kabalas—to the defendants 2nd party and others, in opposition to his own authority, and contrary to the conditions laid down in the deed of compromise, and thereby injured the rights of the plaintiff, the rightful party; that as the disputed property is an ancestral one, and the defendant 1st party is a person possessing no authority, and he obtained possession simply with the consent of the plaintiff,

by no means authority to sell, nor were defendants 2nd party justified in making purchase in the face of the plaintiff's ts; nor does there appear from the kaba- of the purchasers that there existed stringent necessity; nor was there any ing necessity in connection with the h. On the contrary, the property yields ys income fully sufficient to meet all nses required for feeding travellers, as as requisite and necessary expenses ected with the said muth. And there- the plaintiff maintains that the sale ted by the defendant 1st party to the ndants 2nd party was void, and on that nd he brings this suit to have it set e.

We need not read the defendant's written ment; it is sufficient to say that it had effect of putting the plaintiff to the proof is case.

The Moonsiff went very carefully into the ence adduced before him, and arrived e conclusion that, out of the Rs. 9,500 sideration-money paid by the defendants party to the defendant 1st party for the chase of the property which is the subject suit, Rs. 4,040 were needed by the ndant 1st party for the purpose of meet- pressing debts and necessities of the h; and on that ground he was of nion that the purchase was good and valid the extent of Rs. 4,040 consideration- ey, and bad to the extent of the remain- of the consideration-money. In this he gave a decree to the plaintiff in the owing form: "That a modified decree e given to the plaintiff for 3-annas 2-pie krants share out of the property in dis- te; that the kabala in question be eclared not prejudicial to the plaintiff when e becomes the mohunt after the death of lohunt Hunooman Geer, and be amended respect of the property decreed."

In other words, he made a declaration in our of the plaintiff's supposed reversionary ts that this kabala should not operate ersely to him to the extent of 3-annas e and 5-krants share out of the property veyed.

It is very clear that this decree was made er a misapprehension of the rights of the intiff, so far as he had any rights resting the facts which the Moonsiff found. the transaction of sale was one and visible; either the property was well veyed by the defendant 1st party to the ndants 2nd party, or it was not. If it well conveyed and the sale was valid, then the plaintiff was not entitled, even assuming that he had such reversionary rights as the Moonsiff supposed he had, to have the sale set aside to any extent whatever. On the other hand, if the conveyance was not operative as against the plaintiff to pass a valid title to the property which was the subject of suit, but was one which the plaintiff was entitled to ask to have set aside, it should have been set aside in its entirety; although it would in that case of course be a question for the Court to consider whether the conveyance should be set aside absolutely, or only set aside upon condition that the plaintiff should re-pay either the whole of the consideration-money or such portion of the consideration-money as the Court was of opinion had been properly and rightly advanced on the footing of it. The Moonsiff appears to have neglected this side of the case altogether, and to have been led to pass a decree which we could not on any view of the facts allow to remain in force.

However, on appeal against this decree, the Judge formed the opinion from the evidence that the sale of the property by the defendant 1st party to the defendants 2nd party was, as against the plaintiff, altogether a fraudulent and collusive transaction; that there had been no consideration paid by the defendants 2nd party to the defendant 1st party; and that consequently the plaintiff was entitled to have the sale set aside altogether and unconditionally.

We think that this decree is also wrong, even if the Judge was right in the view which he took of the facts of purchase. We have already read so much of the plaint as shows the ground upon which the plaintiff placed his right of action. It was shortly this: that he was the real mohunt, and was owner of this property by mohuntee right as the chela and successor of the deceased Imrit Geer; but that for reasons which he set out in his plaint he had given to the defendants 1st party a life-interest in the property subject to a restraint upon alienation and waste. Now, the Judge of the Lower Appellate Court has very rightly held that the solehnama upon which the plaintiff relies is as between the plaintiff and the defendant 1st party good and powerful evidence in the case. Indeed, the Judge seems to have thought that it, in some way or other, supplies the place of custom. He says: "The terms of that solehnama were, that "he (defendant 1st party) was to retain "possession of the entire property left by"

"Imrit Geer for his life, Bhoobun Geer (the "plaintiff) acting as manager, and that he, "after Hunooman Geer's death, was to suc- "ceed to the mohuntship and the property.

"It must be borne in mind that, until the "institution of these cases, no objections "were urged against the solehnama. It "was accepted, acted upon, and became the "custom—*the rule of action as it were.* "It is therefore now indisputable, and plaint- "iff's reversionary right to the mohuntship "unquestionable. From that solehnama he "is undoubtedly justified in instituting the "present proceedings."

The words in the foregoing passage, "became the custom—rule of action as it were," are obscure, but whatever be their exact meaning or force, they appear to indicate a misapprehension of some importance. No doubt the solehnama, a deed admittedly executed by the plaintiff and the defendant, was quite effective as between these two persons to support such rights of property as it purported to pass to either the one or the other. But it could not in any way supply the place of "custom" as evidence of the character, or the incidents of the dedicated property so far as other persons were concerned with it. We do not know in what way "custom—rule of action" could have value in this case, except as evidence of the terms of the original dedication of the property and of the law of descent or succession dependent thereon. But, if the Judge referred to them in this view, then certainly these two persons, the plaintiff and the defendant 1st party, could not, by agreeing between themselves, even for any good consideration, alter the law of succession or the incidents of the tenure of the property itself. Afterwards the Judge apparently repeats this view of the effect of the solehnama. He says: "It is averred that he "(defendant 1st party) sold the property for "the payment of just debts, but it will be "seen that he never obtained on any one "single occasion plaintiff's consent to his "proceedings. This was informal, as Hunoo- "man Geer merely held a life-interest in the "property by his own act and deed which, "as it was unopposed, became the custom. "He settled that the plaintiff was on his "death to succeed to the entire property left "by Imrit Geer, part of which will be seen "he had quietly disposed of under the six "kabalas, and had the plaintiff not insti- "tuted the present proceedings, Hunooman "Geer would have swept away the entire "property leaving the plaintiff a beggar."

These remarks may or may not be justi as between the plaintiff and the defend 1st party; but they are not applicable w the question is, what are the rights of t persons in the property itself?

Now it is remarkable that, when we l to the solehnama, we find that the posi taken up by the plaintiff is entirely destro by the very instrument upon which he h self relies. The document comme thus: "Now between your petitioner ("is, the present plaintiff) and the said Mo "Hunooman Geer a compromise has b "made to the effect that Mohunt Hunoo "Geer, the legal heir and representativ "Mohunt Imrit Geer, deceased, sho "during his lifetime, continue, as before "hold possession of the *asthan* and m "at Mouzah Pukree Khan Kurum, Per "nah Murwaha Kulun, &c., and the e "estate and property appertaining the "left by the deceased, as an absolute p "prietor, and discharge village and pu "affairs without committing any act "waste."

Assuredly, this is the strongest poss evidence, we may say conclusive evide against the plaintiff that the defendant party, Hunooman Geer, is the mohunt right of due devolution of this prop upon him, on the occurrence of his pr cessor Imrit Geer's decease. He does hold it by virtue of any grant of a interest in the property from the plain but he holds it in the character of mo as absolute proprietor by right of his moh ship inherited from Imrit Geer, decea Nothing can be plainer than this from very words of the solehnama itself. the truth is, that instead of Hunooman G deriving any rights or interests in this p perty from the plaintiff by virtue of, an pursuance of, this solehnama, it is plaintiff who derives a certain limi interest — namely, the right of being manager of the property from Hunoo Geer, the defendant 1st party; and the la is by this instrument acknowledged to be rightful and absolute owner.

So that the plaintiff is entirely put on Court by the very deed—the very docum upon which he relies. And if he says still by virtue of this solehnama he ha against the defendant 1st party the rig being considered the reversionary heir the person entitled to take the proper reversion upon the death of the defe 1st party, and that in that character he a right to complain of the alienations

e taken place, and to ask that they be tained, it is plain that whatever right of kind he may have against the defendant party, he cannot have any as against the ndants 2nd party. He can have no t to sue the defendants 2nd party, who ow in possession and enjoyment of this erty as purchasers from the defendant arty, unless he can show that he has, at time, as against them, a right of some in the property itself. But Hunooman mohunt, whatever right of this kind plaintiff has got must be derived by of the solehnama from Hunooman; rom him he could obtain no right to the erty as against third persons, unless oman, as mohunt, had the power to e of the property, or, at any rate, to he plaintiff the reversionary interest in ch he claims. The plaintiff's own case Hunooman was not even mohunt, and no power of disposing of the property It would, therefore, be at least ano- s if the plaintiff were now allowed to round and to say, although my conten- in this respect is not established, yet oman's ownership as mohunt did enable to give me, and by the solehnama he ve me such an interest as entitles me tain from the Court a declaration of against the purchasers from him. We ot, however, obliged to consider this , because we are of opinion, upon a deration of the solehnama, that it does rofess to pass to the plaintiff any right, t or reversionary, in the property. It y states that Hunooman is the present l mohunt, and that the plaintiff is the n who, as chela and heir of Imrit Geer, sed, will, on the death of Hunooman, ed him as mohunt without opposition. ost this is a nomination of the plaintiff e defendant's (No. 1) successor, the of succession flowing therefrom by tion of law.

hether the law will or will not, under circumstances, give him the right to ed, we have not the means of judging, use we have not the smallest evidence e us as to the terms of the dedication of roperty (if the property is dedicated to eligious use) or the rule of its devolu- We, therefore, cannot say whether or y virtue of the solehnama or otherwise, plaintiff has any greater right to the erty than the right to be the manager of ing the life of defendant No. 1.

the same reason, namely, the absence dence, we cannot say whether or not the mohunt is limited in the exercise of the power of alienation; and, if so, whether or not the plaintiff, as chela of Imrit Geer, or as member of the sect or otherwise, is entitled to enforce the restriction.

Thus it seems to be quite plain that the plaintiff has failed to establish any cause of suit against the defendants 2nd party, in whose hands the property is, either for the purpose of recovering it, or for the purpose of obtaining any remedy by way of injunction or otherwise for securing the ultimate reversionary rights to the property which he may be entitled to. He has made out no other rights than such rights as he may have under the solehnama against the defendant 1st party himself, and those rights are personal; they are not rights of property in the land.

We, therefore, think that the plaintiff's suit fails altogether, and should be dismissed.

The learned pleader who appears for the respondents in the other cases (Nos. 767, 799, 805, 806, and 809 of 1873) says that the decision which is just now passed must apply to them also. Therefore the order in all the cases will be that the decree of the Lower Appellate Court be reversed, and the plaintiff's suit dismissed with costs in all the Courts.

The 5th March 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Act VIII. of 1859, s. 287—Execution.

Case No. 380 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Backergunge, dated the 11th September 1873.

Dhunput Singh Bahadoor (Decree-holder), *Appellant,*

versus

Wooma Sunkuree Goopta and others (Judgment-debtors), *Respondents.*

Baboos Sreenath Doss and *Gooroo Dass Banerjee* for Appellant.

Baboos Romesh Chunder Mitter, Chunder Madhub Ghose, and *Kashee Kant Sen* for Respondents.

When a copy of a decree or of an order for execution is transmitted by the Judge of one district (A) to the Judge of another (B) for the purpose specified in Act VIII. of 1859, s. 257, the Judge of the latter district has no authority to transmit it to a third district. If complete execution cannot be had in district B, it is the business of the decree-holder to have his decree re-transmitted to the Court whose duty it is to execute it, and there to obtain a fresh certificate for transmission to any other district where execution may be practicable.

Jackson, J.—We think it unnecessary to consider in this case whether the decision of the Judge of Backergunge is correct or not, because we think it clear that this decree could not have been executed in the district of Backergunge upon the certificate of the Judge of Dacca. The decree is one of the Dinagepore Court, and that Court, under the provisions of sections 285 and 286 of the Civil Procedure Code, had transmitted the decree for execution to the Judge of Dacca. The plaintiff, having obtained what he could in that district, seems to have applied to the Judge of Dacca to transmit the decree to a third district. We find no authority in the Code of Civil Procedure for this being done. By section 287: "Copy "of any decree or of any order for execu- "tion, when filed in the Court to which it "shall have been transmitted for the purpose "of being executed, shall for such purpose "have the same effect as a decree or order "for execution made by such Court, and "may, if the Court be the principal Civil "Court of original jurisdiction in the district, "be executed by such Court or any Court "subordinate thereto to which it may "entrust the execution of the same." That seems clearly to limit the purpose for which the decree was transmitted, *viz.*, for the purpose of being there executed. It becomes the decree of the Court receiving it only for the purpose of being executed within its jurisdiction either by the Court itself or by any Court subordinate thereto. It seems to us, therefore, that, if complete execution cannot be had there, it is the business of the decree-holder to have his decree re-transmitted to the Court whose duty it is to execute it, *viz.* (in most cases), to the Court where the decree was made, and thereto obtain a fresh certificate for transmission to any other district where execution of it may be practicable. We think, therefore, that this appeal must be dismissed with costs, rupees two hundred.

The 6th March 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glo *Judges.*

Execution—Wassilat—Act VIII. of 1859, s.

Miscellaneous Appeals from an or passed by the Officiating Judge Sylhet, dated the 24th April 1873. ma fying an order of the Moonsiff of Son gunge, dated the 17th September 1872.

Case No. 213 of 1873.

Pran Kishore Deb (Decree-holder), *Appella*

versus

Mahomed Ameer and another (Judgme debtors), *Respondents.*

Mr. M. L. Sandel for Appellant.

Baboo Rujonee Nath Bose for Respond

Case No. 239 of 1873.

Mahomed Ameer and another (Judgme debtors), *Appellants,*

versus

Pran Kishore Deb (Decree-holder), *Respondent.*

Baboo Rujonee Nath Bose for Appellants.

Mr. M. L. Sandel for Respondent.

A question having arisen in the execution of a dec as to assessing wassilat, the first Court held that decree-holders were entitled to wassilat of a 2-a 13-gundas share

The Judge held on the appeal of some of the ju ment-debtors that the decree-holders were entitled 1-anna 10-gundas share, and rejected the objectio raised by the decree-holders under s. 348, Civil P cedure Code:

HELD that the Judge was wrong in amending t Moonsiff's decree with reference to the share, as t objection was not taken in the Court of first instance

HELD that the Judge was bound to dispose of t objections taken by the decree-holders under s. 348, a if there was any difficulty arising from the absence some of the judgment-debtors, he ought to ha directed that they should be made respondents.

Kemp, J.—The appeal No. 213 is a appeal on behalf of one out of three decre holders, and No. 239 is an appeal of two o the judgment-debtors out of fifty judgme debtors. It appears that the decree was obtained so far back as in 1860. Consider able delay occurred in assessing the wassila which is explained by the first Court by the fact of the decree-holder having obtained

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session of the different mouzahs covered the decree at different periods and not at period. The question at issue in this is with reference to the wassilat of ok No. 4, which is said to be an integral ion of the parent estate consisting of eight oks. The first Court held that the ree-holders were entitled to wassilat of ok No. 4, assuming 2 annas 13 gundas e the share of that talook to which the ree-holders were entitled. The Judge held that the decree-holders are only led to 1 anna 10 gundas instead of nas 13 gundas. He also rejects the ction raised by the decree-holders under ion 348, and the decree-holders now come in special appeal in No. 213 on the wing grounds: *1st*, That the Lower ellate Court was wrong in rejecting the s appeal filed by the decree-holder against two judgment-debtors who had appealed, the alleged ground that the decision on might affect other parties who had appealed. The second ground is that the gment-debtors never having raised any ction in the first Court in regard to the nt of the decree-holder's share, either heir written statement or in their petition bjections to the Ameen's report, or even heir petition of appeal, the Court below wrong in entertaining it for the first e.

he question raised in the judgment-or's appeal (Special Appeal No. 239) is : There were certain julkurs upon which ilat had to be assessed, and the first held on the evidence of twelve witnesses the wassilat of these julkurs amounted s. 3,030, and that the mesne-profits of -annas 13-gundas 1-cowrie 1-krant share e talook covered by the decree, namely, k No. 4, would amount to Rs. 505, and if that sum was divided into sixteen , the decree-holder would be entitled to portionate share of that money as set in the decree of the Moonsiff. The e confirmed the decision of the Moonsiff reference to the wassilat of the julkur, held that the evidence of the witnesses ined by the decree-holder was credible rustworthy, and that no cause had been n to the contrary. He also observed if the judgment-debtors had desired to that evidence, they could have produced julkur leases, or the counterparts of leases, the kubooleuts, or called upon rties who held those leases to produce ; that the decree-holder's witnesses been examined long ago, so far back as in July 1868; and that nothing had been done by the judgment-debtors either in the way of calling evidence on their side, or of rebutting the evidence adduced by the decree-holders, which evidence was not hearsay evidence, but was given by the witnesses from their personal knowledge of what had been actually paid by the parties in possession and enjoyment of the julkurs.

With reference to the grounds taken in Special Appeal No. 213, we think that the Judge was wrong in amending the decree of the Moonsiff with reference to the shares in talook No. 4, to which the decree-holders are entitled, as that objection was not taken in the Court of first instance, and was taken for the first time in the Appellate Court.

Then with reference to the objection taken by the decree-holder under section 348, that was an objection on the ground that certain mouzahs which were included in the decree, and for which wassilat was due, had not been included in the calculation of wassilat, and there is also an objection as to interest not having been allowed. The Judge says that because the other judgment-debtors are not before the Court, therefore he cannot allow that objection under the aforesaid section to be raised. Now, it is very clear that there were fifty judgment-debtors, and so many of them as forty-eight did not appeal against the decision of the first Court which found wassilat to be due in proportion of 2 annas 13 gundas 1 cowrie 1 krant; they apparently were satisfied with the decision of the Moonsiff. The decree-holder's objection was under section 348. The judgment-debtors who did appeal with reference to the finding of the Moonsiff on an objection taken for the first time in appeal, were present before the Judge, and therefore if there was any difficulty in hearing the objections of the decree-holder under section 348 in the absence of the other judgment-debtors, the Judge ought to have directed that they should be made respondents. We, therefore, think that the Judge was bound to dispose of the objections under section 348, and the case must, therefore, go back for that purpose. The decision of the Judge with reference to the extent of the share in talook No. 4 on which the decree-holders are entitled to wassilat is reversed, and the case will go back for the Judge to hear the objections of the decree-holders under section 348, making the other judgment-debtors respondents if necessary.

With reference to the appeal of the judgment-debtors, we think there are no grounds

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whatever for it. The grounds of special appeal filed by them are very indistinct and indefinite. Twelve witnesses were examined by the decree-holders to prove the amount of wassilat claimed; they gave evidence from their own personal knowledge, and that evidence was considered by the Judge to be credible and trustworthy. The judgment-debtors took no steps either to rebut that evidence or to examine witnesses on their own behalf, and in special appeal they came up on a vague ground that several of the julkurs were not mentioned by the witnesses, without specifying what julkurs were not so mentioned, and without giving any clue which would enable the special respondents to meet the ground taken in special appeal. Their appeal is, therefore, dismissed with costs; pleaders' fees 2 gold mohurs.

The 6th March 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Certificate under Act XXVII. of 1860—Debts of an Endowment.

Case No. 234 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Chittagong, dated the 9th May 1873.

Bhyrub Bharuttee Mohunt (Petitioner), *Appellant.*

Baboo Okhil Chunder Sen for Appellant.

A District Judge was held to have rightly refused a certificate under Act XXVII. of 1860 for the collection of the debts of an endowment.

Kemp, J.—THE petitioner applies as the successor of Mohunt Juwala Bharuttee, of Asthan Baroolea Koond, for a certificate under the provisions of Act XXVII. of 1860.

In the petition applying for a certificate a schedule of property is given, and it is said that there is a decree outstanding valued Rs. 300, and mahajunee debts outstanding amounting to Rs. 700. The application does not appear to have been opposed by any party. The Judge is of opinion that he cannot grant a certificate to the petitioner inasmuch as the certificate applied for is not for the property of the deceased mohunt, but for the property of the endowment itself; and that if the petitioner has been duly appointed mohunt, he is entitled in virtue of that appointment, and not by right of succession to the deceased mohunt, to collect the debts due to the endowment. Therefore, holding that Act XXVII. of 1860 has no application to a case of this description, he dismissed the application.

On appeal, the ground taken is that the Judge has taken a wrong view of Act XXVII.

We think that the Judge's view of Act XXVII. of 1860 is a correct one. That Act was passed for the greater security of persons paying to the representatives of deceased Hindoos, Mahomedans, and others not usually designated as British subjects debts which are payable in respect of the estates of such deceased persons. Then again, in section 4 of the same Act, it is enacted that the certificate of the District Court shall be conclusive of the representative's title against all debtors of the deceased and shall afford full indemnity to all debtors paying their debts to the person in whose favour the certificate has been granted. Now it is not for a moment contended that these debts were due to the mohunt personally: they are due to the endowment and are not debts of a deceased person at all; and the petitioner, as directed by the Judge, is entitled to collect these debts provided he has been duly appointed mohunt of the endowment, but he is not entitled to a certificate under the provisions of Act XXVII. of 1860.

The appeal is therefore dismissed, but without costs, as no one appears on the other side.

The 6th March 1874.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Confirmation of Possession—Declaratory Decree—Fraudulent Sale—Evidence of Bona Fides—Onus Probandi.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Tacoordeen Tewarry

versus

Nawab Syed Ali Hossein Khan and others.

In a suit for confirmation of their possession of certain mouzahs, plaintiffs as heirs of a deceased lady

* From the judgment of Seton-Karr and Mitter, JJ., in Regular Appeal No. 427 of 1866, decided on the 13th August 1867—8 W. R. 341.

prayed that it might be done after reversal of a mmary proceeding, and after setting aside a fraudulent fabricated deed of sale alleged to have been made her in favour of defendant (her occasional man of ness) while living alone and apart from her natural risers. The first Court decreed the suit, confirming intiffs' possession, and setting aside the deed. The h Court, holding that plaintiffs had no possession, ersed so much of the decree as confirmed plaintiffs in session, and gave a declaratory decree concluding it they could not give substantive relief:

LD that the High Court erred in that conclusion, the prayer of the plaint that the deeds might be set le was a prayer for substantive relief.

In a suit for setting aside deeds, some evidence ought be given by the plaintiff in order to impeach the ds he seeks to set aside. But, in the case of sales or s made by a lady in such a position as that of the y from whom defendant claims, the strongest and t satisfactory proof ought to be given by the person claims that the transaction was a real and *bonâ-* one, and fully understood by the lady.

THIS was a suit brought by the respondents inst the present appellant, Tacoordeen warry, for a confirmation of their possesn of certain mouzahs; and their plaint, ich declared that their suit was for that nfirmation, also prayed that it might be ne after a reversal of a summary proceedg, and which is the most important part of eir prayer, after setting aside a fraudulent d fabricated deed of sale set up by the ppellant. The deed which is sought to be peached is of the date of the 23rd of July 61. The respondents are the heirs of ussamut Koodrutonissa, a purdanasheen dy, who, some time before her death, seems o have had some dispute with her relatives, nd went to reside in the town of Patna. he appellant, Tacoordeen Tewarry, was ving in Patna; and, in the course of the vidence given in this suit, it was stated by he witnesses on the part of the plaintiffs hat Mussamut Koodrutonissa went to live n his house; that she died there; and that he had acted on several occasions as her ookhtear. The deeds which are impeached re a deed of sale of the mouzahs from the ady to Tacoordeen Tewarry, professing to e made in consideration of a sum of Rs. 9,501 (a large part of which, namely, Rs. 7,960, is stated to have been paid to a reditor of the lady), and a mookhtearnama or the execution of that deed.

When the case came before the Principal Sudder Ameen, evidence was gone into on both sides; on the part of the plaintiffs to show that they were in possession of the property, and also to impeach the validity of the deeds on the ground that they were forged and fabricated, and that there had been no real sale from the lady to the appellant. The appellant went into evidence to show that he had been in possession of the property subsequently to the date of the alleged deed during the lifetime of the lady, and had continued in possession up to the time of the suit, and also to show that the deeds were really executed, and that the consideration-money had passed. Upon a review of the evidence on both sides, the Principal Sudder Ameen came to the conclusion that the plaintiffs were in possession of the property, and that the deeds were fabricated; and he made a decree confirming the plaintiffs in the possession, and directing that the deeds should be set aside. The appellant appealed to the High Court, and that Court disagreed with the Principal Sudder Ameen as to his finding upon the possession of the property. They thought that, upon the whole of the evidence, the respondents had not proved their possession, and, in fact, that the possession was with the appellant. Being of that opinion, they reversed so much of the Principal Sudder Ameen's decree as confirmed the plaintiffs in their possession, holding that they had no possession which could be the subject of confirmation. The High Court then went into the consideration of the substance of the dispute, namely, whether the deeds were genuine deeds or not. In approaching that question, they seem to have assumed that they could only deal with it by way of declaration, and they came to the conclusion that they had power to declare the title to the estate, but could not give any substantive relief. Their Lordships think that they erred in coming to that conclusion; the plaint prayed that the deeds might be set aside, which is a prayer for substantive relief; and the Principal Sudder Ameen was quite right when he came to the conclusion on the facts that the deeds ought to be set aside, in making a decree to that effect. However, the form in which the High Court considered the question does not really alter the substance of their decision. They, after a full and careful review of the evidence, came to the same conclusion as the Principal Sudder Ameen, namely, that these deeds had not been executed by the lady.

It was contended by Mr. Bell that the High Court ought not to have thrown the onus of supporting the deeds upon the appellant; and perhaps the mode in which the High Court treat this question may not be strictly correct. In a suit for setting aside deeds, some evidence ought to be given by the plaintiff in order to impeach the deeds he seeks to set aside; but the Court seem to have regarded this suit as if it were an

action of ejectment brought by the appellants as the heirs of the deceased lady, in which, having proved that they were her heirs, the burden was thrown upon the appellant to show a better title. But, although the Judges do not quite correctly state the principle of fixing the onus, their judgment is substantially right, because the plaintiffs did not put their case before the Principal Sudder Ameen simply upon their title as heirs, and throw it upon the appellant to prove a better title, but they did, by evidence, challenge the validity of the deeds. They called witnesses to show the circumstances under which this lady lived, and to challenge proof of the consideration having passed which the deed alleges to have been given. It may be that the evidence is weak, but the appellant accepted the onus which that evidence *primâ facie* cast upon him; and he went into his whole case, and gave the evidence that he thought would best support it. Upon a review of that evidence, the High Court came to the conclusion that it was utterly insufficient to establish the validity of the deeds under the circumstances of the case.

Now the circumstances of the case are that this lady was a purdanasheen, living apart from her relations; whether in the house of the appellant or not may not be distinctly proved, but certainly in a place where she was without those natural advisers which a lady, when she was going to part with apparently the whole of her property, ought to have around her. She, whilst thus alone and unprotected, is supposed to have made a deed in favour of a person who, on some occasions, acted as her man of business. According to the principles which have always guided the Courts in dealing with sales or gifts made by ladies in such a position, the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them that the transaction was a real and *bonâ-fide* one, and fully understood by the lady whose property is dealt with. So far from giving satisfactory evidence on these points, the appellant has failed to produce that which clearly was within his power, and which ought to have been given even in an ordinary case of a sale that is at all impeached. It is alleged that the deed of sale was executed by the lady herself, and also by a mookhtear called Mookondee Lall, who had a mookhtearnama from her for that purpose. The mookhtearnama is filed and appears upon this record; but Mookondee Lall, the mookhtear who is supposed to have executed this deed, is not produced as a witness. Again, the execution of the mookhtearnama is supposed to have been verified by the Nazir and three witnesses, the Nazir having afterwards reported to the Principal Sudder Ameen who registered the document. The Nazir and those three witnesses have not been called. And further, the writer of the deed of sale himself, who was present according to the evidence at the time when the deed was executed, is also kept out of the witness-box. The deficiency of this important evidence is attempted to be supplied by the testimony of witnesses who say they were present at the execution, but who, as compared with those who would have been the authentic witnesses of the transaction, are not at all fit to be relied upon. Their Lordships also agree with the High Court that there is no trustworthy evidence of the payment of the purchase-money, either by satisfying the alleged claim of a creditor of the lady, or otherwise.

The case on the part of the appellant was attempted to be supported by the evidence of proceedings which had taken place in the lifetime of the lady in rent-suits, and in a suit in which there was a contest between the lady and her relatives. Documents in those suits referred to the sale; and authenticity is endeavoured to be given to the transaction in consequence of the lady herself having recognized it. But there is an entire absence of satisfactory proof that those documents, which are said to contain confirmatory evidence of the transaction, were executed by the lady, or that, if she did execute them, their contents were known to her.

On the whole, therefore, their Lordships entirely agree with the substance of both the decisions below that these deeds are not genuine, and ought to be set aside.

Their Lordships think that the decree of the Principal Sudder Ameen was correct in form as well as in substance. The High Court, acting on their opinion that they could only make a declaration of title, whilst professing to confirm (except as to the possession) the Principal Sudder Ameen's decree, really vary its terms by inserting a general declaration that the plaintiffs are the rightful owners of the property, instead of the specific order that the deeds should be set aside. They reversed the decision of the Principal Sudder Ameen with regard to the possession—a reversal in which their Lordships concur—and added what follows:

heir formal decree, "and that so much of e decree of the said Court as declares at the said plaintiffs are the rightful wners of the said property be confirmed." eir Lordships think that, as the plaint had yed for substantive relief, namely, that deeds should be set aside, the more rect form of decree is in the terms of that yer.

Their Lordships will, therefore, humbly ise Her Majesty to vary the decree of the h Court by striking out so much thereof purports to confirm the decree of the ncipal Sudder Ameen, and to order that, ieu thereof, so much of the last-named ree as ordered the deed of sale and the khtearnama to be cancelled and set aside affirmed.

The 9th March 1874.

Present:

he Hon'ble C. Pontifex and E. G. Birch, *Judges.*

t Family-property—Presumption of Hindoo aw—Separate Acquisition—Adverse Possesion.

Case No. 612 of 1873.

cial Appeal from a decision passed by he Officiating Judge of East Burdwan, dated the 22nd February 1873, reversing decision of the Subordinate Judge of hat District, dated the 17th July 1872.

Heera Lall Roy and another (two of the Defendants), *Appellants,*

versus

Bidyadhur Roy (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose and *Kajender Misser* for Appellants.

Baboo Hem Chunder Banerjee for Respondent.

a suit to establish plaintiff's right to a share in t properties belonging to a family subject to the Mitakshara Law, where a part of the property sued for was admitted to be joint, HELD that the presumption of Hindoo Law was that the residue of the property was also joint, and that the onus lay with the defendants to prove separate acquisition without the aid of joint funds.

Where the members of a Hindoo family are living in a joint family-house enjoying in common the produce of part of the joint property, the separate possession by any member of a specific portion of the joint property ought not to be treated as an exclusive or adverse possession against the other members.

Pontifex, J.—THE plaintiff in this case is a descendant in the third degree from one Huree Singh Roy. The defendant Heera Lall Roy is a descendant in the fourth degree from the same ancestor, and the other principal defendant Sukha Moyee is the widow of an adopted grandson of the same common ancestor.

The plaintiff sued to establish his right to a share in several properties, claiming that such properties were joint family-properties, and that the family was subject to the Mitakshara Law. The Subordinate Judge in effect disallowed the plaintiff's claim, but his decision was reversed by the Judge.

From the latter judgment the defendants now appeal.

The Subordinate Judge does, however, find that part of the property sued for was the property of the common ancestor, and continues undivided, and with respect to that property he made his decree in the plaintiff's favour.

The property so held to be joint, and which the defendants themselves admit to have that character, consists of a dwelling-house in which all the descendants of the common ancestor live, about 105 beeghas of land, and a granary in which the produce of the 105 beeghas is stored, from which produce all the members of the family are supported.

The members of the family live, as has been said, in the joint family dwelling-house in separate apartments, and, though resorting to a common store of grain for their food, mess separately in their own apartments.

Under these circumstances, the Subordinate Judge placed the onus upon the plaintiff of proving that the residue of the property sued for was joint. The Judge on appeal held, and we think very properly held, that, under the circumstances of the case, the Subordinate Judge had thrown the

onus of proof on the wrong party, and that, on failure of the defendants to prove that the residue of the property sued for had been separately acquired without the aid of joint funds, it must be considered, according to the presumption of Hindoo Law, to be joint family-property.

The allegation of separation was not only unsupported by evidence, but, in a previous suit, the family had been admitted by the defendant to be joint.

The purchase of the property claimed as separate out of separate funds was found by the Judge not proved, and the admittedly joint property is not so small in value as to make it unreasonable to suppose that the other acquisitions might have been purchased out of its profits.

We are bound in special appeal to accept the Judge's findings on the evidence. So far, therefore, we are clearly of opinion that the judgment appealed from was correct.

But the appellants raise a further issue of limitation, which they say has not been tried in the Courts below, though raised in their original defence. An issue of limitation was in fact raised in the first Court, but in the view taken by the Subordinate Judge it did not become necessary for him to try the question of limitation.

The Lower Appellate Court does not in terms try the question of limitation, and we should send the case back for that issue to be tried if we considered that, under the circumstances, it could be raised with success. But, for the trial of such issue, it must be assumed that the property was originally joint; and although the separate enjoyment of originally joint property by one member of the family to the absolute exclusion of the other members may, under particular circumstances, be such an adverse enjoyment as against the rest of the family as to bring into operation the law of limitation, we do not think that, under the circumstances of the present case, when the members of the family were living in a joint family-house enjoying in common the produce of part of the joint property, that the separate possession of any member of such family of any specific portion of joint property ought to be treated as an exclusive and adverse possession against the other members of the joint family so as to bar them of their otherwise admitted rights.

Upon the whole, therefore, we find ourselves obliged to reject the special appeal with costs.

The 9th March 1874.

Present:

The Hon'ble W. Markby and E. G Birch, *Judges.*

"Peshcushi Sunnud"—Lessee's Rights.

Case No. 1005 of 1873.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 17th December 1872, reversing a decision of the Additional Sudder Moonsiff of that District, dated the 30th November 1871.

Goluck Rana and others (some of the Defendants), *Appellants,*

versus

Nubo Soonduree Dossee (Plaintiff), *Respondent.*

Baboo Bhowanee Churn Dutt for Appellants.

Baboo Kashee Kant Sen for Respondent.

A *peshcushi* sunnud, or grant at a quit-rent, of a homestead and waste land, being construed to assign a heritable right in a tract of land capable of yielding fruits, by virtue of which the holder during the continuance of his right possessed absolutely the entire use and fruits thereof:

HELD that the lessor (or grantor) had no more right to the trees planted by the lessee than he had to the crops sown by him.

Birch, J.—THIS suit has been treated by both the lower Courts as a suit brought to establish the plaintiff's right to certain trees standing on the tenure of defendant, and cut and appropriated by defendant, and to recover the value thereof.

The Moonsiff found that the defendant and his ancestors had held the tenure since 1189 B.E. under a *peshcushi* sunnud granted by the proprietor of the village. He came to the conclusion that no trees had been cut down by the defendants. He discussed at length the evidence adduced by the plaintiff, and held that he had failed to prove that he had by custom a right in the trees growing on lands covered by a *peshcushi* sunnud; that consequently his prayer for declaration of right could not be granted. The suit was accordingly dismissed.

On appeal, the Judge came to a different conclusion. Upon the evidence he held that the plaintiff had proved that the trees had been cut down and appropriated by the defendants, and he further held that the plaintiff had proved that the trees on the estate belonged to him as talookdar, and not

the tenants; that the onus was on the defendants to prove their special title to the number on their lands; and that their sunnud, admitted to be genuine, conferred on them a title to cut down trees. He declared the plaintiff's title to the trees established, and awarded Rs. 40 as the value of the trees cut and appropriated.

In special appeal it is contended that the Judge has not rightly understood the terms of the defendant's sunnud, and that the evidence does not establish the usage the plaintiff-talookdar sets up.

It seems to me that the Moonsiff's finding, that the sunnud was the basis of a possession extending over 90 years on the part of the defendants, is well supported. The Judge says that, even if admitted to be genuine, the sunnud confers on the defendants no right to cut down trees. It thus becomes necessary to consider what this document is, and what rights it confers on the grantees. It is a *peshcushi* sunnud, a grant at a quit-rent, of one and a half beghas of "kuna bastu" and waste jungle land; and after specification of boundaries the deed goes on to recite: "Within these limits I have given to you to cultivate as a mote this land; having brought it into cultivation at your own cost, you shall yearly pay me the fixed annual *peshcushi* jumma of Rs. 2-8. Having paid rent into my zemindaree cutcherry, you, your sons, and your son's sons and descendants in succession shall continue to hold the land defined above. The *peshcushi* jumma shall never be changed. Therefore I give you this *peshcushi* sunnud."

There is nothing peculiar to this country about the form of this lease. It corresponds to the "emphytensis" of the civil law, which was an assignable inheritable right in a certain tract of land capable of yielding fruits by virtue of which, and in return for the payment of a yearly quit-rent, the holder, during the continuance of his right, possessed absolutely the entire use and also the fruits thereof. The reason for granting these perpetual leases are thus assigned by Domat, and I have no doubt that the same reasons actuated proprietors in this country who had tracts of waste land to dispose of and led them to confer grants of a corresponding nature at a low rent.

Tomkins and Jenkins on Modern Roman Law.

Section 544.—"For since the owners of "barren lands could not easily find tenants for "them, a way was invented to give in perpetuity such kind of lands on condition that "the grantee should cultivate, plant, and otherwise improve them as the word 'emphytensis' signifies. By this agreement the proprietor finds on his part his account by "assuring to himself a certain and perpetual "rent, and the perpetual tenant finds likewise his advantage in laying out his labour "and industry to change the face of the "ground, and to make it fruitful." He goes on to say (section 549): "That, by giving the "land and reserving the rent, there is as it "were a partition of the rights of property "between the owner of the land and the perpetual tenant. For the owner who grants "the perpetual lease remains master in so far "as to enjoy the rent which he has reserved as "the fruit of his own proper lands by which "he retains the chief right of property, "which is that of enjoying the thing as "owner of it together with the other rights "which he has reserved to himself. And "the perpetual tenant on his part acquires "the right of transmitting the estate to his "successors for ever, of selling it, giving it "away, alienating it with the burdens of the "rights which the lessor of the rights has "reserved to himself, as also a right to plant, "to build, and to make what other changes "he shall think proper for improving the "estate, which are so many rights of property."

The relations existing between the plaintiff and defendant in the case before us appear to me accurately defined in the last section quoted.

At the time the grant under consideration was made, the land was waste and jungle. No rights were reserved. To enable the grantee to cultivate, he first had to cut down and root out the original jungle, and he was free to plant trees or sow crops as he thought fit. So long as he obtained his rent, the grantor could not interfere with him. There being an express grant the question of custom need not be considered.

I can find only one case in which the point before us has been raised; the report of that case, Weekly Reporter, 1864, page 367, is so meagre that it is of no assistance to us; what the nature of the ryot's lease was in that case is not stated, and it has not been cited as an authority.

It may be the custom in some parts of the country that, as between the zemindar and ordinary ryots holding under terminable leases, the right to growing trees is with the zemindar; with that question we have nothing to do. We have simply to decide

whether the plaintiff talookdar is the owner of the trees, the subject of this suit. In my opinion such a claim is untenable. The zemindar has, under such circumstances as are disclosed in this case, no more right to the trees planted by the defendants than he has to the crops sown by him.

The decision of the District Judge must be set aside, and the order of the Moonsiff dismissing the suit be restored. The plaintiff must pay the defendant's costs in all the Courts.

Markby, J.—I concur.

The 9th March 1874.

Present:

The Hon'ble W. Markby and E. G. Brich, *Judges.*

Decree—Execution—Remedies—Right of Suit.

Case No. 480 of 1873.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 18th November 1872, affirming a decision of the Moonsiff of Sonamookhee, dated the 31st January 1872.

Shero Coomaree Dabee (Defendant), *Appellant,*

versus

Shitaram Hazra and others (Plaintiffs), *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Sreenath Doss for Respondents.

Money realized in execution of a decree may be recovered by suit, if the decree is set aside as regards the party seeking to recover.

If such party was not a party to the original decree, and his name appeared there owing only to misrepresentation, he is not restricted to the Court executing the decree, but is at liberty to seek his remedy in a separate suit.

Markby, J.—I THINK that the decree in this case is right, and that the special appeal ought to be dismissed. The facts stated are that one Shero Coomaree sued one Shaikh Khaja Mullick to recover possession of certain land. Hazra and others, claiming to be the owners of the property, asked leave to come in and to defend the suit, which leave was refused. Nevertheless, when the suit was dismissed, Shero Coomaree in her appeal named Shitaram Hazra and his co-claimants as respondents, and a notice was consequently served upon them in the usual form.

Shitaram and his co-sharers did not appear, and the judgment of the first Court being reversed, a decree for recovery of possession was given in which they were included. That decree is dated 2nd November 1868.

Subsequently, Shitaram and his co-sharers brought a suit to have their title to the very property declared, one of the defendants being Shero Coomaree who had been successful in obtaining the decree of November 1868. Shitaram and his co-sharers obtained a final decree declaring their title on the 31st December 1870.

Whilst this second suit was pending Shero Coomaree took proceedings in execution of her former decree against Shitaram and his co-sharers to recover a sum of money awarded her by that decree either for costs or mesne-profits (it is not quite clear which), whereupon Shitaram and his co-sharers, in order to prevent a sale of their property, deposited in Court the amount claimed under protest, and Shero Coomaree received that amount on account of her decree.

Shitaram and his co-sharers have brought the present suit against Shero Coomaree to recover the money so paid by them; the amount which they seek to recover is Rs. 375.

The Court of first instance gave the plaintiffs a decree, and that decree has been affirmed by the Court of appeal.

In special appeal it is contended that the money now sued for was recovered in execution of the process of the Court, and cannot be recovered back.

As a general rule no doubt this is so; and had the decree in execution of which this money was recovered remained in force, the plaintiffs might not have been able to recover in this suit.

But in this case both Courts appear to us to have found that the judgment in the first suit has been set aside, so far as the present plaintiffs are concerned, by the proceedings in the second suit. It seems to us, therefore, that there is no impediment to this suit.

It is also said that the question being one relating to the execution of the decree in the first suit arising between the parties to that suit, it is to be determined by the Court executing the decree in that suit, and not by a separate suit; and that this present suit is, therefore, improper. But I think the present plaintiffs have been shown not to have been

ies to the first decree. Their names, it ue, appeared on the decree, but that was g to the misrepresentation of Shero maree that they were defendants in the t below. The record has been searched, it appears that Shitaram and his harers were never made defendants in first suit. On the contrary, the only r was a refusal of their own application they might become so. The erroneous tion of their names in the proceedings he Appellate Court was due to the epresentation of Shero Coomaree, and error has been rectified by the subse- nt suit.

he other objection that this is a suit in ch no appeal lies to this Court need not onsidered, inasmuch as, having heard the ment, we are satisfied that the judgment e Court below was right.

he appeal is dismissed with costs.

The 11th March 1874.

Present:

e Hon'ble W. Markby and E. G. Birch, *Judges.*

yment by Surety—Subrogation—Surety's Rights and Remedies.

Case No. 1450 of 1873.

cial Appeal from a decision passed by he Officiating Judge of East Burdwan, dated the 22nd April 1873, affirming a decision of the Subordinate Judge of that District, dated the 28th December 1872.

Heera Lall Samunt (Plaintiff), *Appellant,*

versus

ud Oozeer Ali and others (some of the Defendants), *Respondents.*

aboos Romesh Chunder Mitter, Chunder Madhub Ghose, and *Rajender Misser* for Appellant.

aboo Mohesh Chunder Chowdhry and *Moulvie Murhumut Hossein* for Respondents.

Applying the law of England and Scotland and the eral law of Europe to this country, it was held that, en a surety has paid off the debt of his principal, not y are all the collateral securities transferred to the ety, but, by what is called subrogation, the right is transferred to him to stand in the place of the inal creditor, and to use against the principal debtor ery remedy which the principal creditor himself could have used. Accordingly the surety is not debarred from proceeding against the original debtor upon the instrument itself which created the debt, by reason of the debt having been paid by himself.

Markby, J.—In special appeal No. 1450 which was argued yesterday, the short facts are these: That one Mazedoollah, on the 18th Assin 1273, executed a deed of conditional sale in favour of the plaintiff. Subsequently a notice of foreclosure was served, and, after expiry of the year of grace, the present suit for recovery of possession was brought against Mazedoollah. Upon this several other persons came forward and made claims to the property, and were made defendants in the suit. It is now only necessary for us to notice the case of the defendant Oozeer Ali and that of the defendant Zohoor Ahmed. The case of Oozeer Ali was that on the 14th Jeyt 1273, Mazedoollah borrowed a sum of money from one Gobind Chunder; that he, Oozeer Ali, was surety on that occasion, and the money was secured by a mortgage-bond; that Oozeer Ali having himself paid the balance which was due to Gobind Chunder under the bond, Gobind Chunder had at his instance instituted a suit against Mazedoollah upon the mortgage-bond, and obtained a decree under which the property comprised in the mortgage-bond was sold; and that he (Oozeer Ali) purchased it. The answer to that made by the plaintiff in this suit was that all those proceedings were merely colourable, and intended to defeat his claim upon his conditional sale. That question of fact was investigated in the Courts below, and it has been found that that is not so; that there was a real mortgage to Gobind Chunder, and that the proceedings were *bonâ fide* and honestly conducted, and that they were good and valid as against the present plaintiff.

Now, the first question which has been raised in this Court in special appeal is that, under the law of this country, when a mortgage-bond is paid off by the surety, it is absolutely put an end to and extinguished, and no further proceedings can be taken upon it. But no authority bearing upon the subject has been quoted, the decision in the 9th Weekly Reporter, page 230, having really nothing whatever to do with this matter. Therefore we must decide the question by analogy of the law of other countries; and it appears to us clear that, by the law of England and the law of Scotland, and, as far as we are aware, by the general law of Europe, when a surety has

paid off the debt of his principal, not only all the collateral securities are transferred to the surety, but, by what is called subrogation, the right is also transferred to him to stand in the place of the original creditor, and to use against the principal debtor every remedy which the principal creditor himself could have used. The only doubt that was ever thrown upon that in England appears to have arisen out of the decision of Lord Eldon in the case of Copis *vs.* Middleton, decided about the year 1824. That decision appears, however, to have been considered somewhat too narrow, and the law of England is now contained in the Mercantile Law Amendment Act, 1856 (19 & 20 Vict., c. 97), which enacts that "every person "who being surety for the debt or duty of "another, or being liable with another for "any debt or duty, shall pay such debt or "perform such duty, shall be entitled to "have assigned to him, or to a trustee for "him, every judgment, specialty, or other "security which shall be held by the creditor "in respect of such debt or duty, whether "such judgment, specialty, or other security "shall or shall not be deemed at law to have "been satisfied by the payment of the debt "or performance of the duty; and such "person shall be entitled to stand in the "place of the creditor, and to use all the "remedies, and, if need be, and upon a "proper indemnity, to use the name of the "creditor, in any action or other proceeding "at law or equity, in order to obtain from the "principal debtor, or any co-security, co-"contractor, or co-debtor, as the case may "be, indemnification for the advances made, "and loss sustained by the person who shall "have so paid such debt, or performed such "duty; and such payment or performance "so made by such surety shall not be plead-"able in bar of any such action or other "proceeding by him."

It seems to us, therefore, that the law of this country may be reasonably taken to be that which has been considered equitable in other countries, namely, that the surety is not debarred from proceeding against the original debtor upon the instrument itself which created the debt, by reason of the debt having been paid by himself. Therefore that disposes of the first point in favour of the defendant Oozeer Ali.

Then it is said that supposing that to be the case, still the surety can only proceed against the principal for the actual loss which he has incurred in consequence of his having been called upon to pay the de Now, possibly, that might be the case, possibly here if Mazedoollah had raised t question when the suit was brought aga him, he could have succeeded then in e blishing that view of the law. But must observe in the first place that that not the state in which this case now is. T judgment was actually recovered aga Mazedoollah, and by regular proceedings Court; the estate has been sold, and is absolutely vested in Oozeer Ali; and m than that no sort of case of this kind made in the Court below. The plain came into Court, simply asking for posses of the property, entirely ignoring the ri of Oozeer Ali, and entirely denying, w they were asserted, that any such ri existed. It seems to us, therefore, that would be now wholly improper to allow plaintiff to shift completely the ground his action, so as to raise any question of t description. It is, therefore, unnecessa for us to consider whether, if that view the case had been put forward in the Co below, it could have been maintained. I sufficient, to dispose of this case, for us say that that is not the question which been raised in this suit in the Court belo and therefore it cannot now be raised special appeal. Upon this ground, therefo we think that, so far as that portion of t property which is in the hands of Ooze Ali is concerned, the special appeal ought be dismissed.

Then, as regards that portion of t property which is claimed by Zohoor Ahme it appears that he claimed under a purcha from Mazedoollah prior in date to the condi tional-sale to the plaintiff. He had not a first obtained possesison under his deed o sale, but he subsequently did so in a suit in which he obtained a decree, and under that decree obtained possession. The only objection which is now made to his title is that his bill of sale was not registered; and the plaintiff relies upon section 50, Act XX. of 1866, which provides that a sale or mortgage which is registered shall take effect a against any prior sale or mortgage which is unregistered. Now this point also does not appear to have been raised below, and all that we know about it is that the Judge does certainly say in his judgment that the bill of sale was unregistered, merely referring to that in dealing with the question of facts which was before him, namely, whether or not that was a genuine sale. But we cannot upon that observation of the Judge, hold

a conditional sale which was subsequently executed is to take precedence of the which had already taken place. A decree been obtained by the vendee on his bill sale (and we must assume that to be a decree), and under that decree he has ained possession. It seems to us that the session which he obtained is possession er the only title which he had, namely, sale to him by Mazedoollah, and we not, merely because the Judge remarks that that bill of sale was unregistered, that that was an improper decree, and the possession which he held under that ree is to be postponed to the conditional under which the plaintiff claims.

Upon these grounds, therefore, we think the decision of the Court below is right, the special appeal ought to be dismissed h costs.

The 11th March 1874.

Present:

e Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

nt-suit — Mortgage-bond — Alienations Pendente Lite—Certificate of Sale—Registration.

Case No. 1830 of 1873.

pecial Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 3rd July 1873, affirming a decision of the Officiating First Subordinate Judge of that District, dated the 19th March 1873.

Raj Kishen Mookerjee (Defendant), *Appellant,*

versus

Radha Madhub Holdar (Plaintiff), *Respondent.*

The Advocate-General for Appellant.

r. C. Jackson and *Baboo Bhyrub Chunder Banerjee* for Respondent.

In a suit for rent by the auction-purchaser of property which had been sold in execution of a money-decree, defendant admitted being in possession, but denied the alleged relationship of landlord and tenant, pretending that the property had been purchased by himself at a sale in execution of a decree which he had obtained upon a "mortgage-bond," *i.e.*, a money-bond with a clause creating a charge upon the property. The suit on this mortgage-bond was commenced after the attachment upon which the property was sold to the plaintiff, but was pending when plaintiff purchased:

HELD that the fact of the suit being for rent was no bar to the Courts going into the real question between the parties—whether defendant's tenancy had merged in his higher right of proprietor:

HELD that a purchaser under an execution is bound by a *lis pendens*; for it would be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail:

HELD that the mortgagors were bound by the proceedings in the suit including the attachment and sale, and defendant had a good title against plaintiff in the same manner as against the mortgagors whose interest plaintiff purchased, even if the certificate of sale was not registered.

Couch, C. J.—IN this case the suit was brought by the plaintiff for rent of certain property which had been sold by auction in satisfaction of a money-decree against Matunginee Dabee, and purchased by the plaintiff. The plaintiff alleged that the defendant was in possession of the property under a putnee in the name of his son, and sought to recover the rent with interest for a period commencing at the date of his purchase.

The defendant admitted that he was in possession of the property, but alleged that the relation of landlord and tenant did not exist between him and the plaintiff; that the plaintiff had never taken possession of the property which he purchased; that it was mortgaged to the defendant; and that the defendant obtained a decree for the money due on the mortgage, and purchased the property himself at the sale in execution of the decree; and therefore the plaintiff was not entitled to receive the rent which he claimed.

The Subordinate Judge who first tried the suit, after stating what the defendant urged by way of defence, did not inquire into it, but determined that the defendant was responsible to the plaintiff for the rent until the question of the right set up by him was adjudicated upon in a regular suit.

Upon the appeal, the Officiating Judge said: "The third point is that the defendant "having a mortgage on the property obtained "a decree, brought it to sale, and purchased "it himself, thus becoming malik as well "as putneedar. The full consideration of this "would involve several somewhat intricate "questions of right and law which cannot "be properly decided in a rent-suit, and into "which it is therefore unnecessary to enter."

Both Courts, therefore, avoided deciding what was the real question between the parties. Instead of finally determining the matter in dispute, they left it to be determined in another suit, and they gave to the plaintiff a decree for rent which it might

afterwards appear he was not entitled to have. Its being a suit for rent did not prevent the Courts from going into the real question between the parties, and determining whether the defendant by reason of his purchase in the manner alleged had ceased to be liable as a tenant, and had become, in fact, the proprietor of the land, so that the tenancy merged in his higher right. This is a mode of dealing with the case which cannot be defended. In fact, when the special appeal came on before us, it was seen that it could not; and we were asked, as there was no dispute about the facts of the case, to decide whether the plaintiff was entitled to recover his rent or not. The decision of this depends upon the dates of the transactions which were stated to us by the learned Counsel who appeared for the respondent.

The attachment upon which the sale at which the plaintiff purchased took place was on the 7th of November 1871. In December 1871, the defendant brought his suit upon his mortgage which was what is generally called a mortgage-bond—being a money-bond with a clause creating a charge upon the property, and not a mortgage by way of conditional sale, which would convey the property to the defendant. In February 1872, there was a decree by consent in that suit, the decree being in the usual form, and authorizing the realization of the money due upon the mortgage by a sale of the mortgaged property. On the 18th of April 1872, the property was sold under the attachment of the 7th of November 1871, through which the plaintiff claimed, but a few days before that, the property had been attached by the defendant in execution of the decree which he had obtained. The plaintiff, as has been already mentioned, was a purchaser at the sale on the 18th of April, and he claimed rent from that date.

It was objected that the certificate of the sale to the defendant had not been registered, and that the defendant was, therefore, unable to use it as evidence of his title. The certificate of the sale to the plaintiff had been registered. The question is whether, under these circumstances, the defendant can be considered to have acquired as against the plaintiff a title to the property, because if he has, he cannot be liable to pay to the plaintiff the rent which has become due afterwards.

It does not appear at what precise periods the rent was payable, or whether any instalment of it became due between the date of the plaintiff's purchase and the date of defendant's purchase. If any instalment become due between those dates, the plai is entitled to it, because the defendant only claim exemption from payment of from the time when he became the purch We have to consider then, whether, not standing the non-registration of the ce cate of sale, the defendant has a good tit

The suit on the mortgage-bond was, we have stated, commenced in Dece 1871, and was pending at the time plaintiff purchased. The mortgagors bound by the proceedings in that including the attachment, the order for and the order of the Court confirming sale; and if the plaintiff is bound by th the defendant will have a good title aga him in the same manner as he would against the mortgagors whose interest plaintiff purchased.

The right and interest which the plai purchased was the right and interest wh the mortgagors had. And if the effect the suit was to bind the plaintiff, it was no matter that the certificate of sale not registered.

The question whether a purchaser un an execution is bound by a *lis pendens* considered by the late Supreme Court Gour Monee Dabee *vs.* Read, 2 Taylor Bell, p. 83. It was not necessary the decision of that case that the Co should determine the question; but learned Judge who delivered the judgm seems to have considered that it was which it would be proper for him to dec and he held that the doctrine of *lis pend* did not apply to a purchaser at a sale by Sheriff. If he were right, it ought not apply to a purchaser at a sale in execut of a decree under Act VIII. of 1859. B the judgment of Sir James Colvile is found very much (we do not say altogether, b very much) upon the fact that in th English Courts there had been no decisi applying the doctrine of *lis pendens* to case of that description. It does not appe to have occurred to him that at that tim from the state of the law in England there could not have been such a decisio What remains in the mortgagor is only wha is known as the equity of redemption, the right to sue in a Court of equity to be allowed to redeem the property.

That was not an interest which could be taken by the Sheriff in execution of a judg ment of a Court in England and be sold by him. It was not until the Act 1 and

toria, c. 110, s. 13, by which judgments re made charges upon real property, that equity of redemption could be sold in faction of a judgment; and then it did become the subject of a sale by the riff, but was treated as an interest in the —an estate in it which came within the ration of that Act.

o the absence of decisions in the Courts England upon the question which came re the Supreme Court is fully accounted

he only effect of holding that the doc- e of *lis pendens* does not apply would be the proceedings in the suit against the rtgagor would become ineffectual. If e is a sale in execution of a decree nst him pending those proceedings, the on buying at the sale does not get more n the mortgagor had, that is, he gets only right to redeem the property. And the ult would be that the mortgagee (we use term mortgagee to describe the person o is suing on the mortgage-bond to blish his charge, for the reasoning applies the one case as much as in the other) ld have to bring a fresh suit against the chaser in order to foreclose him from eeming; and if pending the suit, there a decree against him in another suit, and execution of it his right and interest were ched and sold and some person purchased a third suit would be necessary. This in fact, stated by Sir James Colvile at 11 in his judgment, for he says: "If e purchaser at a Sheriff's sale should fail o set aside the decree for fraud, he would supposing the doctrine of *lis pendens* to pply to him) be absolutely defeated; whereas the successful suitor in equity is nly delayed: he can always reassert against e purchaser at the Sheriff's sale those quities to which the judgment-debtor was ubject."

According to this the mortgagee could ssert against the purchaser at a Sheriff's e the right to foreclose or to have the perty sold in order to realize the money e on the mortgage.

The ground upon which the doctrine of *pendens* rests is stated in a modern deci- n in England, and it will be found to apply a case like the present. In Bellamy *vs.* bine, which is a leading case on the subject, 1 DeGex and Jones 566, Lord Justice mer says that the doctrine is not founded on any peculiar tenets of a Court of uity as to constructive notice, but prevails e in law and equity resting on this found- ation that it would be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail.

Now to apply what is there said to be the foundation of the doctrine to a case like the present, it would be impossible for the suit by the mortgagee to have the money realized by the sale of the mortgaged property to be brought to a successful termination, if persons buying under an execution against the mortgagor are not to be bound by the proceedings. Although there may be no decision of the English Courts upon this question, the case, in our opinion, clearly comes within the reason of the rule, and with the utmost respect to the Judges of the late Supreme Court we feel compelled to say that we cannot treat their decision as an authority on this point. It appears to have been questioned by the profession at that time from the note to the report in Taylor and Bell.

In the present case the property was ordered to be sold, and was sold in execution of the decree obtained by the mortgagee. There was an order confirming the sale, which order would relate back to the time of the sale; the sale would be confirmed as from the date when it was made. And although the certificate of the sale might be necessary for the purchaser, if he was seeking to establish his title against other persons, yet without any certificate the defendant in that suit, the mortgagor, and the plaintiff in the present suit, would be bound by the proceedings, and there would be a good title against them. The order confirming the sale would complete the title of the defendant as against them. The Registration Act does not require that the order confirming the sale shall be registered; in fact, orders and decrees are mentioned in it as not requiring to be registered.

The result is that in this case the defendant has shown that as against the plaintiff he had a right to be no longer treated as a tenant from the time when he purchased the property. If any rent, as we have said, became due between the two periods the defence will not apply to that. We will postpone making our decree in order that the parties may agree if they can, whether any rent, and, if so, what amount, became due between the date of the plaintiff's purchase and the date of the defendant's purchase.

It having been agreed between the pleader for the appellant and the pleader for the respondent that Rs. 250 became due between the dates of the respective purchases, we reverse

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the decrees of the lower Courts, and give a decree for the plaintiff for Rs. 250, and interest thereon at 6 per cent., from the institution of the suit, with costs in the lower Courts in proportion to the amount decreed, and the respondent will pay the costs of this appeal.

The 12th March 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson and W. Ainslie, *Judges*.

Breach of Contract—Penalty—Liquidated Damages—Invalidity of unreasonable Contract—Issues—Defence.

Case No. 2 of 1873.

*Appeal under section 15 of the Letters Patent of 28th December 1865, against a judgment of the Hon'ble W. Markby and the Hon'ble E. G. Birch, two of the Judges of this Court, dated the 19th July 1873, the said Judges having been equally divided in opinion.**

Zebonnissa and others (Defendants), *Appellants*,

versus

Brojendro Coomar Roy Chowdhry (Plaintiff), *Respondent*.

The Advocate-General and *Baboos Kalee Mohun Doss* and *Chunder Madhub Ghose* for Appellants.

Mr. J. P. Kennedy and *Baboos Sreenath Doss* and *Doorga Mohun Doss* for Respondent.

The suit was to recover principal and interest under the terms of an ekrar which was as follows: Plaintiff agreed to advance Rs. 20,000 to defendants who were to give him, as security for re-payment with interest at 18 per cent. per annum, an ijara for a term of ten years; one-fourth of the profits to be taken by plaintiff for the interest, one-half of the remainder in reduction of the principal, and the remaining half to be received by defendants. It was also stipulated that if the defendants failed to give the ijara, they should repay the advance with interest at 75 per cent. per annum, and that if the plaintiff *would not accept* the ijara, he should receive back his money without interest within six months from his refusal. The ekrar also contained a provision that if, at the end of ten years, the one-fourth share of the profits should not cover the interest, defendants would pay the deficiency in cash:

HELD that the interest at 75 per cent. was not intended to be in the nature of a penalty, or anything more than an estimate of damages for breach of contract.

HELD that in the absence of any confidential relation between the parties, of any imposition or misrepresentation, or any want of capacity, the Court could not say that the contract to give the ijara, for the breach of which interest at 75 per cent. was to be paid, was itself to be held invalid as being unreasonable or oppressive.

Parties who have had a suit determined upon questions which they thought fit to raise in the first Court are not entitled to make a different case in the Court of Appeal, though the Appellate Court may in some cases allow this to be done.

THE Advocate-General, for the appellants, contended that the ekrarnama was void so far only as it related to the payment of interest at the rate of 18 per cent. per annum on the sums advanced by the respondent to the appellants; but it ought not to be enforced so far as it related to the payment of interest at the rate of 75 per cent. per annum, on the ground that it was oppressive, that it was unreasonable, that it was obtained by the exercise of undue advantage, that it was contrary to Hindu Law, and that it was in the nature of a penalty.

It would seem from the judgment of Birch, J., that the respondent being fully aware of the predicament in which the appellants were at the time, and knowing full well that they were anxious to save their family-estates from being sold for arrears of revenue, desired and consented to their entering into this unconscionable agreement, which, but for their necessitous conditions, they might perhaps not have entered into. Under the circumstances, therefore, the contract should not be enforced because it was obtained by the exercise of undue advantage, and because it was oppressive and unreasonable. In the case of Stilwell *vs.* Wilkins, Jacob's Reports 282, Lord Eldon said: "That though a general a sale will not be set aside on the ground of inadequacy of price, yet there may be cases of inadequacy so enormous as great as to form a ground for cancelling a contract." And in the case of Heathcote *vs.* Paignon, 2 Bro. C. C. 167, 175, Lord Thurlow said: "If mere inadequacy is the ground, it should seem that it was scarce sufficient. But there is a difference arising between that and evidence arising from inadequacy. If there is such inadequacy as to show that the person did not understand what he was doing, or was so oppressed that he was glad to make it, knowing its inadequacy, it will show a command over him which may amount to fraud."

In this case it is clear that the respondent took advantage of the appellants' necessitous circumstances, and they were glad

* 20 W. R. 317.

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enter into the bargain, hard as it was, save their estates from being sold. Lord Eldborn, in the case of the Earl of Aylesford v. Morris, 8 L. R., Ch. App., 489, says: "There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting — weakness on one side, usury on the other, or extortion or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain."

He further goes on to say that "fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *primâ facie* to raise this presumption, the transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable;" *vide* also Bom. H. C. Rep., A. C., 11; 4 Bom. H. C. Rep., A. C., 202. In the present case the respondent is a Hindoo, and under the provisions of the Hindoo Law, it has been clearly decided that "no greater sum of interest than the principal sum can be recovered at any one time"—3 Bom. H. C. Rep., A. C., 25; 4 Bom. H. C. Rep., A. C., 202; 3 Ben. L. R., O. C., 130; and 1 Bom. H. C. Rep. 47.

Moreover, there was no breach of the ekrarnama on the part of the appellants, for they offered to give the ijara to the respondent, but he did not take it, and it was ultimately given to Mahomed Mirza, with the full knowledge and consent of the respondent. But, even if the appellants failed to give the ijara to the respondent, the respondent could not ask the appellants to give him 75 per cent. per annum, because such would clearly be regarded as a penalty, and a Court of Equity would refuse to enforce a bargain which is in the nature of a penalty. In the case of Hurbullubh Narain Singh *vs.* Genda Moharaj, 20 W. R. 457, it was held, by Mr. Justice Phear, that the increment of 50 per cent. (which would become due in the event of non-payment of an instalment on the day on which it was to be paid) was in the nature of a penalty, as it bore no relation to any actual or supposed loss which the zemindar might sustain from the delay in the payment; and that the plaintiff was entitled to recover only so much as would compensate him for such loss.

In the present case, apart from the fact that the respondent knew and consented to the giving of the ijara to Mahomed Mirza by the appellants, there is no proof whatever that the respondent suffered any loss by the supposed failure on the part of the appellants to give him the ijara; and, even if there was a loss suffered, the respondent would be amply compensated by the payment of interest at the rate of 18 per cent. per annum, which the appellants are ready and willing to give him.

Mr. Kennedy, for the respondent, contended that there were no grounds whatever for saying that the ekrarnama was oppressive, unreasonable, and unconscionable. And he submitted that, even if it had been proved to have been oppressive and unconscionable, that would not *per se* vitiate the contract. A Court of Equity would only interfere for the purpose of granting the relief asked for when it is satisfied by clear evidence that the contract was entered into fraudulently. In this case no charge of fraud of any kind was even alleged to have been committed.

The appellants, with their eyes open, and fully believing that they would be benefited, deliberately entered into the contract. The mere fact of the interest being large would not be sufficient either to vitiate the ekrarnama or necessitate a diminution of the interest. There must be fraud shown to have been committed before the ekrarnama in the present case could be declared to be void.

In Kedari bin Ranu and Bhairu bin Janku *vs.* Atmarambhat bin Narayanbhat and Hari Sadashiv, 3 Bom. H. C. Rep. 20, Mr. Justice Westropp says: "We are not "at all to be understood as laying down, as "a general principle, that men who are "perfectly cognizant of what they are doing, "are to be relieved from the consequences "of any hard bargain into which they may "willingly enter." Again, in the case of Coles *vs.* Trecothick, 9 Vesey 246, Lord Eldon said: "Unless the inadequacy of price "is such as shocks the conscience, and "amounts in itself to conclusive and decisive "evidence of fraud in the transaction, it is "not itself a sufficient ground for refusing a "specific performance." And in the case of Gwynne *vs.* Heaton, 1 Bro. C. C. 1, 9, Lord Thurlow said: "To set aside a conveyance, "there must be an equality so strong, gross, "and manifest that it must be impossible to "state it to a man of common sense without "producing an exclamation at the inequality "of it."

The present contract cannot be considered as being gross or unfair, at all events to the appellants, because by their letter of the 11th April 1870 they said they were willing to act up strictly to the contract, and desired the respondent to do the same.

It has been asserted by the Advocate-General that, by the letter of the 3rd of February 1870, the respondent acquiesced in the grant of the ijara to Mahomed Mirza; and by his acquiescence he has waived his claim to the interest at the rate of 75 per cent. per annum. Now, it does not at all appear from the letter that the respondent had acquiesced to the giving of the ijara to Mahomed Mirza. The letter merely says that he is willing to "assent to any arrange-"ment that might be made to the defendant's "advantage." If it be the contention of the appellants that, by the letter of the 3rd of February, the respondent waived his right to the 75 per cent., it seems extremely strange that they should have written the letter of the 11th April to the respondent, informing him that it was their intention to act strictly up to the ekrarnama, and calling upon him to do the same. Having written this letter, the appellants are now clearly estopped from saying that there had been a previous waiver by the respondent of his rights under the ekrarnama.

Mr. Kennedy further submitted that the interest of 75 per cent. cannot be regarded in the nature of a penalty. In the case of Hurbullubh Narain Singh *vs.* Genda Moharaj, cited by the Advocate-General, the 4th illustration given by Mr. Justice Phear referred to punctual payment: that, in default of punctual payment, a larger sum shall become due. Such a case would clearly be in the nature of a penalty, but, in the present case, no question of punctual payment arose.

In the case of Herbert *vs.* Salisbury and Yeovil Railway Company, 2 L. R. 224, Lord Romilly said that "it is not the high "rate of interest which constitutes a penalty. "I apprehend it is quite clear that if a "vendor and a purchaser enter into a contract "by which the purchaser agrees to pay "10 per cent. interest from the time that he "takes possession until the contract is "completed, in the absence of any fraud or "misconduct of the vendor, he is bound to "pay interest at 10 per cent. Having made "that contract with his eyes open, he cannot "afterwards complain that that rate of inter-"est is very heavy, or say that, by reason of "the interest being very heavy, it is in the "nature of a penalty, which the Court of "Chancery will relieve against;" *vide* also 12 Moore's Privy Council Cases 199, and the cases cited therein.

The judgment of the Appeal Bench was delivered as follows by—

Couch, C.J.—This case comes before us on an appeal from the decision of Mr. Justice Markby sitting with Mr. Justice Birch. The suit was brought to recover Rs. 20,000 for principal and Rs. 13,765 for interest due according to the terms of an ekrarnama or agreement.

The Officiating Subordinate Judge made a decree in favour of the plaintiff, from which there was an appeal to this Court. And the judgment of Mr. Justice Markby was that the decision of the Subordinate Judge should be affirmed, except as to the interest upon the amount decreed, which was reduced to 6 per cent.

The ekrar or agreement, upon which the suit is brought, states that the parties were entitled to the property which is the subject of it, and that, being unable, as they expressed it, to administer and take care of the mehal and to attend to certain law-suits, which are referred to, they had sought the assistance of the plaintiff, and he had agreed to make them an advance to the extent of Rs. 20,000 within three years. Then they agree that an ijara shall be given to secure the advance and interest at the rate of Rs. 1-8 per cent. per mensem, and they stipulate that, if they fail to give the ijara, they shall repay to the plaintiff the amounts which he may advance with interest at Rs. 6-4 per cent. per mensem from the date of the receipt by them of the loan to the date of liquidation.

The ekrar also contains a provision that, if at the end of the time fixed for the ijara, namely, ten years, the one-fourth share which was to be set apart for interest on the money advanced should not cover the amount of the interest calculated at the rate of 18 per cent. per annum, they would pay to the plaintiff in cash whatever deficiency there might be, and it also provides that, if the plaintiff would not accept the ijara, he should receive the money lent by him without interest within six months from the date of his refusal.

The nature of the transaction was this: The plaintiff agreed to advance money to the extent of Rs. 20,000, which it has been found that he did, and the defendants were to give him as a security for the repayment of the money advanced with interest at 18 per cent. per annum, the ijara for a term of ten years from the 1st of Bysack 1277; one-fourth of the profits was to be taken by the

plaintiff for the interest on the sum advanced; one-half of the remainder of the profits was to be taken by the plaintiff, and applied by him in reduction of the principal sum, and the remaining half was to be received by the defendants.

It would appear from the agreement that the parties did not know what the profits would amount to. It is not shown that any fraud was practised by the plaintiff upon the defendants, or that he deceived them in any way as to what the profits were. The terms of the agreement show that they thought it right to provide for the event of his refusing to take the ijara on the ground that it would not be sufficient or rather a safe security for the advances, and that the amount of the profits would not compensate him for the interest at the rate of 18 per cent. per annum. And he seems to have thought it possible (and they appear to have assented to this) that the half of the remainder of the profits might not be sufficient to repay the principal sum; for they agree that, if at the end of ten years the profits were not sufficient to repay the sum advanced, they will make good to him the balance that might be due with interest at 18 per cent. So far as we can gather from the document, there was an uncertainty in their minds as to the value of the security that was to be given for the money advanced and interest. And then it is stipulated that, if the defendants fail to give the security for the loan and interest, they shall pay the principal sum and interest at 75 per cent. per annum.

The first question to be considered is, is the interest at the rate of 75 per cent. from the time of the advance a penalty, or is it, what is commonly called, liquidated damages—damages which the parties have agreed shall be paid upon the breach of the contract.

The breach which is provided for in this way is a single act, namely, the not giving the ijara. The reasons which exist in the cases where a sum is agreed to be paid on the non-performance of any one of different acts with different consequences to the party who is entitled to have them performed, for saying that it is a penalty, do not apply to the present case. We have to see what was the intention of the parties independently of any such rule of construction.

The value of the security, the advantage which the plaintiff would derive from it, was not capable of precise estimation. It was quite natural that the parties should agree to an estimate of it. And they did so; they agreed that, if the ijara was not given, the plaintiff should get, instead of it, interest at the rate of 75 per cent.; that is, in case of a breach of the contract, they agreed to substitute for the benefit which would be given by the security interest at that rate. It cannot, as I remarked in the course of the argument, be called an alternative contract, because the plaintiff had a right to insist upon having the ijara, if he thought fit to do so, and he might, subject to the question as to whether it is a contract which could be enforced at all, claim a specific performance of it. It is an agreement in the event of the breach in not giving the ijara, to give something else for it. This may have led Mr. Justice Markby to speak of it as an alternative contract. The effect of it is that it provides that the plaintiff, instead of compelling the defendants to give the ijara, may, if he thinks fit to do so, claim the interest at the higher rate. In that way, and so far as he is concerned, it is alternative.

It has been held in various cases in the English Courts, where this matter has been discussed, that the estimate of the damages being apparently excessive is not of itself conclusive that it was intended as a penalty. The Courts have said that, where the damages from the breach of a contract are uncertain, the parties themselves are at liberty to put their own valuation upon them, and the Courts have no standard by which they can pronounce them to be excessive. That seems to be a reasonable rule, and one which ought to be applied in this case. Here we cannot undertake to say that the parties did not consider that, looking at all the circumstances of the case, if the plaintiff lost the security of the property which he would have had by the ijara, it was fair to estimate the injury and the risk which he would incur of not recovering the money at all at the rate of interest which has been agreed to be paid. Therefore, considering the nature of the transaction, that it was a provision to meet the case of the plaintiff being, by the refusal of the defendants, left with nothing but their mere personal security and subject to the difficulty which a creditor so frequently meets with in India of recovering money from his debtor, there seems to be no reason for thinking that, by the agreement for the 75 per cent. interest, the parties intended to anything more than to estimate what the plaintiff would be entitled to as damages. It does not appear that it was intended to be in the nature of a penalty or as a security for the

payment of the much lower rate of interest—the 18 per cent.

We are not, in trying this case, bound by the English decisions, but the rules which have been adopted by the Courts in England may fairly be referred to. And there is nothing in the nature of the transaction or in the rules which had been adopted by the English Courts to lead us to the conclusion that this was intended by the parties to be anything more than an estimate by them of the compensation which the plaintiff was to have, if he did not get his security by means of the ijara.

The question then which we shall have to consider is, whether, taking it to be a contract to pay interest at 75 per cent. as damages for breach of contract to give the ijara, it is of such a nature that the Court will consider it invalid.

Two questions are mixed together: Whether the contract to pay those damages is such as the Courts will allow to be enforced, and whether the contract to give the ijara for the breach of which the damages are to be paid is also such. Mr. Justice Birch has considered that it is not a contract which the Courts would enforce on the ground, apparently, that it is such an oppressive and unreasonable contract that it comes within those principles on which Courts decline to give effect to a contract.

The first observation that arises upon this ground of defence is that the defendants did not raise it in the first Court. They rested their defence upon an altogether different ground. The learned Advocate-General seems to admit that they were extremely ill-advised in putting forward the defence they did. They denied that the ekrar had been executed, and that an advance had been made. They charged fraud and forgery—forgery with regard to the document not having been executed, and fraud in a claim being made for advances which in fact were not made. But they did not allege that the ekrar was given under such circumstances that a Court of Equity ought to set it aside or refuse to allow the plaintiff to recover upon it. Nor do they, in the grounds of appeal to this Court, make such a case as that. If the matter rested there, I think it would not be right to allow this question to be raised. Parties who have had the suit determined upon questions which they thought fit to raise, and to have determined by the first Court, are not entitled to make an altogether different case in the Court of appeal, and raise an altogether different defence. I say "not entitled," because I do not intend to say that there may not be cases in which the Court would allow it. But in this case it appears that although the question was not raised in the first Court nor in the grounds of appeal, the learned Judges allowed it to be argued. They refer to the question in their judgments and I think we cannot treat it now as a question that was not tried, at least, in the Appellate Court, namely, before Mr. Justice Markby and Mr. Justice Birch. We must, therefore, see whether, upon the evidence in the suit, there is a ground for such a defence.

The defendants certainly are not entitled now to give any additional evidence on the question; and they cannot complain of the Court deciding it upon such evidence as there is. The burden of proof was upon them. It being found that the ekrar was executed, it was for them to prove circumstances which made it proper for the Court not to enforce it, or, which is the same thing, to set it aside.

In this case there is not that which is an important element in cases of this description where the deed is set aside, a relation between the parties which involves a confidence reposed by the person executing the deed in the person in whose favour it is executed. Here, the plaintiff had no confidential or fiduciary relation with the defendants. They were apparently induced to go to him, and to ask him to lend them money by their thinking that he possessed peculiar means of influence, peculiar means of assisting them in attaining the object for which they wanted the money. But there was no confidential relation between them. The plaintiff had not any connection of that character with them.

As to information of the value of the property which was the subject of the transaction, it does not appear that the plaintiff had any peculiar means of information on that subject, or that he had any information at all that the defendants had not. The defendants were the persons who would be likely to know most about the value of their property, and what they were agreeing to give as a security for the money which they were asking the plaintiff to lend. There is nothing in the case to show that the plaintiff had any information which the defendants did not possess, or that he gave them any information, or did anything to induce them to enter into this agreement with him. So far, there is nothing which can be said to make it a case of constructive fraud on the part of the plaintiff.

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Then there is another fact in some of these ses which is very important, namely, the pacity of the person entering into the con- et. The Courts have in many cases con- red the incapacity of the person entering o a contract as a very important element in termining whether it ought to be enforced; ch incapacity, as not being of age, or, in e cases, having just attained majority, and case of females who have not proper isers whom they might consult. Here e is nothing of that kind. It is true t some of the defendants were ladies, but ey had every opportunity of consulting eir friends on the subject, and it does not ppear that the plaintiff in any way prevented or did anything to lead them to act with- t taking proper advice. The probability that they were advised by others in the atter, and there can be no ground for setting is deed aside in their case for the want of No circumstance is shown which would ad the Court to consider that this is a con- act that ought not to be enforced except hat we can gather from the contract itself.

Then the question is, ought we, in the bsence of any of the facts to which I have lluded, in the absence of any confidential elation between the parties, of any imposi- ion or misrepresentation, or any want of apacity, to say that this contract is of so ard or unreasonable a character that the Courts ought not to enforce it. There may e cases (they are few) in which a Court of quity has refused to enforce a contract, r has set it aside on that ground. In he words of Lord Westbury in Tennent *vs.* ennent, Law Reports, 2 Scotch Appeals 8: "There is an equity which may be "founded on gross inadequacy of considera- "tion, but it can only be where the inade- "quacy is such as to involve the conclusion "that the party either did not understand "what he was about, or was the victim of "some imposition."

The question then resolves itself into this: Can this Court say that a contract to pay interest at the rate of 75 per cent. per annum, or to give a security for a loan which was considered as possibly of so much value that the plaintiff ought to be paid 75 per cent. interest if he did not get it, is one which the Courts ought to decline to enforce. If we were to say that, it would be in effect to say that the Courts will not enforce a contract to pay interest beyond a certain rate. I am unable to say what rate should be fixed. Looking at the risk in lending money, at the many circumstances which in different cases may induce a person about to borrow money to agree to give a very high rate of interest, benefits which, he thinks, he may obtain by borrowing the money in a particular quarter, considering all possible circumstances, I do not think the Court can undertake to say that a contract to pay interest at this rate is, without other facts being shown, so hard or unreasonable that it should be declared to be invalid. That is what this case is, for, if the Court would not declare the contract to pay interest to be invalid, I do not think we can say that the contract to give the ijara for the breach of which interest at that rate was to be paid is of itself a contract of such a nature that it is to be held to be invalid as being an unreasonable and oppressive one. The parties must have known very well that the plaintiff was expecting to get such a security for his advances, and that he did not get it, he would not be willing to lend them the money unless he was to be paid interest at this rate. Upon this question, then, I think that the decree which is appealed from cannot be disturbed.

Mr. Justice Birch has also considered that there was what has been called a waiver of the performance of the contract, a waiver of giving the ijara, and that, if the plaintiff had waived that, he would not be entitled to recover damages for a breach of the contract in not giving it.

This defence also was not raised in the first Court, nor in the grounds of appeal, but, like the other, it seems to have been raised in the argument of the case before Mr. Justice Markby and Mr. Justice Birch. But what is called a waiver, if it is to be an answer to the claim on the part of the plaintiff, must be not a waiver of the giving of the ijara, the plaintiff not intending to relieve the defendants from the liability to pay the damages if they did not give it; but a waiver or an abandonment of the entire contract. It does not appear to me that the plaintiff ever intended to, or ever did, make such a waiver or abandonment as that. He may have been willing that the defendants should pay him the higher rate of interest instead of giving the security. I think it would require very clear evidence to establish that the plaintiff, having a right to a security for his advance, or, if he did not have that, to be paid interest at 75 per cent. per annum, consented to give up that right, and to retain only the right to be paid interest at the rate of 18 per cent. without any security for even the payment of that.

The letter which has been referred to as supporting the case of waiver is ambiguous. It does not state distinctly what the terms of the negotiations that it refers to were; and it is quite possible that this letter referred, not to the ijara being given to Mirza Mahomed, but to what had been the subject of negotiations before, namely, to the defendants receiving an ijara from him, which would make a great difference. The waiver or abandonment to be an answer to the present suit ought to be clearly proved. The defendants, certainly, in my opinion, have not proved it; and they have so far the advantage that, if they originally intended to make out any case of that kind, they have given such evidence as they thought fit on the subject without having, either in their defence or in their grounds of appeal, given notice to the plaintiff that they intended to do so, so that the plaintiff might have met such a case by evidence on his part. I think this ground of defence also fails, and that the plaintiff is entitled to recover the principal sum and interest at 75 per cent. per annum which has been awarded to him.

The appeal will be dismissed with costs.

Jackson and Ainslie, JJ., concurred.

The 14th March 1874.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Invalid Lakhiraj — Resumption — Polliam — Regulations XXV. and XXXI. of 1802, Madras Code.

On Appeal from the High Court of Judicature at Madras.

The Collector of Trichinopoly

versus

Lukkamani and the Zemindar of Marungapuri.

HELD that Regulation XXV. of 1802 of the Madras Code did not either give to, or take away from, the former owners of lands not permanently assessed any rights which they then had. It merely vested in all zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them.

The object of Regulation XXXI. of 1802 of the Madras Code was merely the protection of the revenue from invalid lakhiraj grants, and to provide for the mode of trying claims to hold lands exempt from payment of revenue. It was not intended to confer upon Government any title which did not then exist, or to assert that, according to the usages of the country, there was no private right to lands:

HELD that there is no long uniform current of decisions to show that every polliam not permanently settled is necessarily only a tenure for life or at the will of Government.

THE nature and object of the suit in which these appeals were preferred are clearly stated in the judgment pronounced by the High Court of Madras (Record 190).

To make the case intelligible, it may be shortly stated that the suit was brought in the Civil Court of Trichinopoly by Lukkamani, the first widow of Tirumalai Puchaya Naiker, the late zemindar of Marungapuri, to recover, as his heiress, amongst other things, the villages attached to the zemindaree. The suit was brought against the Collector of Trichinopoly as the agent of the Court of Wards in charge of the zemindaree, on behalf, and as the guardian, of Rangakristna Mutha Veera Puchaya Naiker, a minor, who was the half-brother of the deceased zemindar, and who, after his death had been recognized by the Government as the zemindar. At the time of the late zemindar's death, he and his half-brother, the minor, were members of an undivided family, and, consequently, if the estate was hereditary, and the minor was legitimate, he was the heir of the deceased zemindar (9 Moore's Indian Appeals 66).*

The principal defences set up by the Collector were:—

1. That no istimraree sunnud had been granted for the zemindaree, and that it was an unsettled polliam; that, after the death of the late zemindar, the right to nominate a successor to him was vested in the Government; that the Government had granted the zemindaree to the minor, Rangakristna; and that this, being an act of State, could not be questioned by any Municipal Court.

2. That, even if an istimraree sunnud had been granted, and the polliam had been settled, the minor, as the undivided half-brother of the deceased zemindar, would be the rightful heir thereto.

The widow disputed the legitimacy of the minor, and the following were the principal issues laid down for trial:—

1. Whether the Court was competent to entertain the suit?

2. Whether the half-brother of the deceased zemindar was his legal heir, or whether the plaintiff herself was entitled to succeed to the zemindaree?

3. Whether the minor was the half-brother of the deceased zemindar?

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* 1 W. R. (P. C.) 90.

Subsequently, the minor, having attained full age, was admitted as a supplemental defendant in the suit; but the first defendant, the Collector, was also allowed to be heard in defence. Whereupon the first defendant, the Collector, having been examined as a witness, the Judge held that it was conclusively proved that the zemindaree was an unsettled polliam, and that the right of succession having been declared by the highest authority to be vested in Government and not in the line of lineal succession, it followed that that right could not be called in question in that Court. He, therefore, found the first issue in favour of the first defendant, and dismissed the plaintiff's suit with costs.

The plaintiff appealed to the High Court, and made only the second or supplemental defendant, the half-brother, respondent. Whereupon the Collector presented a petition to the High Court, stating that it was contended on the part of the appellant that the zemindaree was not an unsettled one, and consequently that the Government had no right to interfere with the succession thereto on the death of the zemindar, and that the Government was interested in the decision of that question; he therefore prayed that he might be made a party to the suit, and allowed on behalf of Government to defend the appeal.

On the 17th June 1870, the petition of the Collector was dismissed (p. 187).

Another petition to the same effect was subsequently presented by the Collector (p. 188), the Government offering to forego all claim to costs. Whereupon it was ordered that the application should be admitted on condition that, in the event of the appeal being dismissed with costs, no more than the costs of one respondent should be allowed against the appellant.

Thus it appears that the Collector, who was originally a defendant merely as agent of the Court of Wards and as guardian of the minor zemindar Rangakristna, became substantially a party to the suit on behalf of, and as representing the interests of, Government. The appeal came on to be heard before the High Court, who, at the close of the arguments on the first day of the hearing, were of opinion, for the reasons specified in their judgment, that, upon the case presented by the record returned to the Court, the decree of the Zillah Court could not stand, and they adjourned the further hearing of the appeal (Record, p. 191, l. 42); afterwards, having obtained all the evidence which the parties were able to adduce with respect to the proprietary right of the late zemindar, and having heard the case fully argued, they delivered judgment (p. 192).

In the first place, they held that the Government proceedings admitting the minor to the succession did not amount to an act of State, which debarred the cognizance of the suit by a Municipal Court.

The correctness of their decision upon that point has not been disputed in the present appeal.

They then (p. 192, l. 16) proceeded to consider the question whether the estate of the late zemindar was hereditary, or whether he had merely an estate for life. Upon that point they delivered a very able and elaborate judgment, in which they held that the polliam was an ancestral hereditary estate. (Record, p. 204, l. 10.)

They said (p. 205):—

"With respect to the proprietary right "possessed by the late zemindar, there is "now before the Court the whole of the "evidence which the parties have been able "to adduce, and we have had the advantage "of hearing the case ably argued. The "question for determination is whether he "had vested in him an hereditary estate, "which passed on his death to his heir in "the order of legal succession, as the plaint-"iff contends, or an estate for life, on the "termination of which the right to dispose "of the property reverted to the Govern-"ment, as the defendants contend. The "villages and lands mentioned in the plaint "form one of the Manapuri polliams, but "the estate and the holder of it have been "commonly given the designations used in "the plaint, of zemindaree and zemindar; it "is however a conceded fact that no istim-"raree sunnud granting the estate under Re-"gulation XXV. of 1802 has ever existed; and "the positions advanced on both sides, stated "summarily, are on behalf of the plaintiff, "that there is sufficient evidence from which "to draw the inference that the property "had been permanently assessed; but, if "not, that the tenure by which the polliams "not permanently assessed are held had not "attached to it as an essential incident the "limit of the life of the holder, but that, "both historically and by judicial authority, "the tenure is rather shown to be in its "nature hereditary; that it may be either "hereditary or for life, according to the "nature of the grant creating it, and that in "the present case the evidence proved the "polliam to have been held as an hereditary "estate."

Then, after reviewing the authorities, the evidence, and the arguments of Counsel, they proceeded:—

"Upon the whole, we are of opinion that "it has been established as strongly as a "claim of this nature can be expected to be "proved that the polliam in dispute is an "ancestral hereditary estate which has "devolved through several generations in "the ordinary course of legal succession. "Almost everything tending to this conclu- "sion that could reasonably be looked for, it "seems to us, exists, save the grant of a "sunnud under Regulation XXV. of 1802; "and that is not, in our judgment, made by "law indispensable, except to render the "revenue-assessment permanent. It follows "that the right of succession contested in the "present suit depends upon the question raised "by the second issue in the suit, whether the "second defendant is the legitimate brother "of the late Polligar, Tirumalai Puchaya "Naiker. If so, he is the rightful heir to "all the property claimed in the plaint, no "division having taken place between him "and his deceased brother. But, if illegiti- "mate, he has no right to any portion of it. "No additional issue is necessary."

An issue was then directed to try whether the half-brother was legitimate or not.

It is admitted that the villages and lands mentioned in the plaint are, as pointed out by the High Court, one of the Manapuri polliams, and that no istimrarec sunnud, granting the estate under Regulation XXV. of 1802 of the Madras Code, has ever been issued.

The case has been very elaborately and ably argued on both sides, and their Lordships having carefully considered all the regulations and authorities which have been cited, are clearly of opinion that the decision of the High Court is correct.

It was contended by the learned Counsel for the Collector appellant that in the Presidency of Madras the Government had reserved to itself and had, by legislative enactments, asserted its right to all lands of every description, and Regulations XXV. and XXXI. of 1802 of the Madras Code were referred to as having that effect.

It was recited in the preamble of the former of those two Regulations that the assessment of land-revenue had never been fixed, and that the zemindars and others had no security for the continuance of a moderate land-tax; *that, for the attainment of an increased revenue, it had been usual for Government to deprive the zemindars, and to appoint persons on its own behalf to the management of the zemindaries, thereby reserving to the Ruling Power the implied right and the actual exercise of the proprietary possession of all lands whatever*; that it was obvious that such a mode of administration must be injurious to the permanent prosperity of the country, by obstructing the progress of agriculture, population, and wealth, and diminishing the security of personal freedom and of *private property*, and that the British Government impressed with a deep sense of the injuries arising to the "State and to its subjects "from the operation of such principles, has "resolved to remove from its administration "so fruitful a source of uncertainty and dis- "quietude, to grant to zemindars and other "landholders, their heirs, and successors, "*permanent property* in their land in all "time to come, and to fix for ever a moderate "assessment of public revenue on such lands "the amount of which should never be liable "to be increased under any circumstances."

It was then enacted by section 2 that, in conformity with these principles, *an assessment should be fixed on all lands liable to pay revenue to Government; and in consequence of such assessment the proprietary right of the soil should become vested in the zemindars or other proprietors of land and in their heirs and lawful successors for ever*; and it was further enacted by section 3 that, when the conditions of the permanent settlement of the revenue should have been adjusted, a sunnud-i-milkeut-i-istimrar or deed of *permanent property* should be granted on the part of the British Government to all persons being or constituted to be zemindars or proprietors of land.

Laying out of consideration for the present the words of the preamble, which form no part of the enactment of the Regulation (see Dwarris on Statutes, p. 655), it is clear that the affirmative words of the 2nd section "that, in consequence of the assess- "ment the *proprietary right* of the soil "shall become vested in the zemindars," &c., did not either give to, or take away from, the former owners of lands not permanently assessed any rights which they then had. It merely vested in all zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them. It is a maxim that affirmative words in a statute without any negative, expressed or implied, do not take away an existing right (see Coke's 2nd "Institute," p. 200; "Dwarris on Statutes," p. 637). There are

words declaring that no proprietary right n existed, or should thereafter be deemed exist, except in Government in any lands t permanently settled; and in their Lordips' opinion it was not the intention of the gislature to pass such an enactment.

The words "proprietor of land," as used h in the Bengal Code of 1793 and in Madras Code of 1802, have a technisignification (see the definition in Benl Regulation VIII. of 1793, sections 5, 6, d 7; and Regulation XXVII. of 1802, dras Code, section 2). They refer to emindars, independent talookdars, and hers who pay the revenue assessed upon heir estates immediately to Government;" d the words "proprietary possession," as ed in the recital of Regulation XXV. of 02, must also be read in a similar sense as eaning the possession and rights of a proictor in the technical sense in which that ord is used, *viz.*, the person who pays the venue immediately to Government. (See egulation I. of the Madras Code, sections 4 and 16.)

There are frequently many valuable tenures xisting between the zemindar and the ryots, r actual cultivators of the land. If the egulations XXV. and XXXI. of 1802 were to e read in the sense contended for on the part f the Collector appellant, they would have he effect of vesting in Government, not only ll hereditary estates, but all sub-tenures, whether for life or otherwise, and whether reated by the native Governments before he territories came under the Government f the East India Company or not.

The words of the recital "the *implied* right and the *actual* exercise of the *proprietary possession*" are, to say the least of them, very ambiguous. But whatever may be the real meaning of those words, the recital clearly was not intended to amount to more than a declaration that it had been usual for Government, in order to enforce an increased revenue, to deprive or dispossess the zemindars, and to take the management of the zemindaries into the hands of their own officers; or, in other words, that they were in the habit of taking khás possession of the zemindaries of those zemindars who neglected to pay any increased amount of revenue assessed upon them.

A similar course seems to have been adopted in Bengal up to the time of the permanent settlement (see Regulation I. of 1793), and to have been continued at the time of that settlement, with respect to every zemindar who might decline to engage for the jumma proposed to be permanently settled upon his estate. (See Regulation VIII. of 1793, section 43, Bengal Code.)

Further, the usage recited was limited to the purpose of obtaining an increased revenue; and it was by means of the usage that the Government was said to have reserved to itself the implied right, &c. The words are "*thereby* reserving to the ruling power the implied right, &c." The preamable recognized the right of private property when it stated that the then existing mode of administration was injurious "*by diminishing the security of private property.*" It did not assert a right on the part of Government to deprive or dispossess zemindars in their lifetime, or their heirs after their deaths, for the purpose of transferring their rights to Government, or to new holders at the will of Government, independent of any considerations connected with the realization of revenue.

The language of the recital applied as much to zemindars in their lifetime as it did to the heirs of zemindars upon their deaths. If the words were to have the unlimited construction and effect contended for, the regulation would have justified Government in depriving or dispossessing the deceased Polligar in his lifetime, and in transferring the zemindaree to a new holder to the same extent as it would have justified them in dispossessing his heirs after his death. Such a construction would go far beyond the claim set up by the Collector in the suit, *viz.*, that the deceased zemindar had only a life estate which reverted to Government, and was at their absolute disposal after his death; nay, it would do more, it would render every landowner in the Presidency, except those who claimed under a permanent settlement, liable to be dispossessed or deprived of his estate, and to have it transferred to a new holder at the will of Government.

The preamble to Regulation XXXI. of 1802, which, as before observed, was not an enactment, is as follows: Whereas the ruling power of the provinces now subject to Fort St. George has, in conformity to the ancient usage of the country, reserved to itself, and has exercised *the actual proprietary right of lands* of every description, and whereas consistently with principle all alienations of land, except by the consent of the ruling power, are violations of that right; and whereas considerable portions of land have been alienated by the unauthorized encroachment of the present possessors, by the clan-

destine collusion of local officers, and by other fraudulent means; and whereas the permanent settlement of the land tax has been made exclusive of alienated lands of every description, it is expedient that rules should be enacted for the better ascertainment of the titles of persons holding, or claiming to hold, lands exempted from the payment of revenue to Government under grants not being badshai or royal, and for fixing an assessment on such lands of that description as may become liable to pay revenue to Government; wherefore the following rules are enacted for that purpose.

The Act, section 2, then proceeds to render valid all grants for holding lands exempt from the payment of public revenue which had been made before certain dates, and to leave to the determination of Government all doubts respecting the validity of other grants of that nature.

The words "has reserved to itself and has exercised the actual proprietary right of lands of every description," used in the above preamble, are not precisely the same as those used in the preamble of Regulation XXV., but they evidently have reference to the same usage, *viz.*, the custom of dispossessing zemindars and taking their zemindarees into the khas possession of Government for the purpose of realizing the public revenue from time to time assessed upon them. The object of the Regulation XXXI. of 1802 was merely the protection of the revenue from invalid lakhiraj grants, and to provide for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue; it was not intended to confer upon Government any title which did not then exist. The words "alienations of lands" referred not to mere transfers from one proprietor to another, but to grants for holding lands exempt from the payment of revenue. It is clear that the Regulation never intended to assert that, *according* to the usages of the country, there was no private right to lands, for in rendering valid all lakhiraj grants made prior to a certain date, and declaring that the holders should continue to enjoy the same free from the payment of revenue, there was this proviso, that the lands had not *escheated* to the State since those dates.

It was urged, in support of the Collector's appeal, that there was a long course of judicial decisions, from 1813 to the present time, showing that Polligars had merely a life-interest in their polliams.

The first case cited was No. 13 of 181 1st Madras Select Decrees, p. 78. In t case the plaintiff had never had the possess of the zemindaree. His claim had b repeatedly brought to the notice of Gover ment, and had been rejected. The perm nent settlement had been entered into w the defendant, and a sunnud-i-milkeu istimrar granted to him by Governme under the provisions of Regulation XXV. 1802. This case was not decided upon mere words of the recital of Regulation XX of 1802, but upon the enactment in section and it was held that the Government havi *permanently* settled with the defendant, a *granted him a sunnud*, he had acquired title under that Regulation, and that t plaintiff could not recover the estate. T decision, however, whether right *or* wro (probably right under the law as it th stood), was decided before the passing Regulation IV. of 1822, by which it w enacted that Regulations XXV., XXVIII and XXX. of 1802 were not meant to defin limit, infringe, or destory the actual rights any description of landholders or tenant and left them to recover in the establish Courts of Justice *their rights* if infringe (an enactment similar in effect to that con tained in the Bengal Regulations relating the permanent settlement in that Presidency (See No. 8 of 1793, Bengal Code, section 30

Regulation IV. of 1822 expressly recog nized the fact that landholders had actua rights which they might recover if infringed

In the case cited (No. 13 of 1813), a case was referred to (Appeal No. 9 of 1813), in which a talookdar's rights were asserted and enforced against a zemindar, which is quite at variance with the contention that the property in lands of every description belonged to and was vested in Government. It is true it was stated by the Court in No. 13 of 1813, that it was plainly deducible from Regulation XXV. of 1802 that, previously to the fixing of the permanent assessment, succession to zemindaree tenures was not governed *exclusively* by the law of inheritance, but that the ruling power created, tolerated, abolished, or disposed of those tenures in such manner as might be considered most expedient for the purpose of realizing the public revenue due from the lands, and that it was clear therefore that, in rejecting the claims of the plaintiff, whatever might be the specific grounds of such rejection, and in granting the zemindaree to the original defendant, the British Government exercised a right which, according to the

clared usages of the country, was vested the Ruling Power. It was to correct nions such as those that Regulation IV. of 2 was passed.

The next case was No. 11 of 1846, 41. In that case there had not been any manent settlement or any sunnud granted Government. The zemindaree had been de over to the father of the plaintiff and endant after the district came into the session of the East India Company, and continued in his possession to the year 1, when, upon his death, it was made to his eldest son. The Court said that respondent held under a title which Government, in the exercise of the right ted in them by the usage of the country, conferred upon him.

One of the Judges who decided the last e was also one of those who decided No. of 1813, evidently putting the same conuction upon Regulation XXV. of 1802 as had done in No. 13 of 1813.

Case No. 14 of 1817 is subject to similar marks. The Court, of which two of the dges were the same as those who decided former case, acted upon similar deductions om Regulation XXV. of 1802.

All those cases were decided prior to egulation IV. of 1822, and were probably me of the decisions which induced the egislature to pass the Regulation.

Their Lordships do not consider that the ases cited from the Madras Select Decrees are binding authorities in support of the ontention that Government has a right to eal with the polliam in the present case, or ny other polliam, according to arbitrary will independently of the rights of the parties, or in support of the position that the absolute ight to every polliam not permanently settled is vested in Government, or that the tenure is for life only, and that, upon the death of the Polligar, the estate reverts to Government.

Many of the cases cited in argument are of no greater weight or authority than that which is the subject of the present appeal. They are modern authorities, and there is no long uniform current of decisions sufficient to show that every polliam* not permanently settled is necessarily only a tenure for life, or at the will of Government.

In the case of Naragunty Lutchmeedavamah *vs.* Vengama Naidoo (9 Moore's Indian Appeals 67*), and in that of the Collector of Madura *vs.* Veeracamoo Ummal (*Id.* 450), the polliams were treated as hereditary, the question in each being as to the person entitled to succeed as heir. In the latter case, the Government of Madras claimed to be entitled by escheat for want of male heirs, thereby admitting that the estate was hereditary; but it was held that females were not precluded from inheriting a polliam, thereby deciding that it was hereditary. It did not appear in any of those cases that the polliam had been permanently settled, or that a sunnud had been granted in respect of it under Regulation XXII. of 1802. They show that a polliam may be hereditary, though not permanently settled under Regulation XXV. of 1802.

Their Lordships are of opinion that each case must depend upon its own particular circumstances; that a polliam may be hereditary, and that the position laid down by the High Court (page 200, line 30) is correct. They there say:—

"The existence of a proprietary estate in polliams or other lands not permanently assessed, and the tenure by which it has been held, are, in our opinion, matters judicially determinable on legal evidence, just as the right to any other property."

Their Lordships are also of opinion that the finding of the High Court upon the evidence adduced that the polliam in dispute is an ancestral hereditary estate is also correct.

It does not at all follow from the application made to Government for the recognition of the minor that he had not an hereditary estate. It was extremely common in Bengal before the acquisition of the Dewanny where a tenure was in fact hereditary from father to son to take out a new sunnud upon each descent (14 Moore's Indian Appeals 256, Kooldeep Narain Singh *vs.* The Government and others). So also it appears that, upon a transfer of title to lands in Calcutta, either by alienation or descent, a fresh pottah was given to the new holder; but that was merely a fiscal regulation, and the pottah formed no part of the holder's title (Freeman *vs.* Fairlie, 1 Moore's Indian Appeals 346).

The Collector in his written statement alleged that the polliam was unsettled, and that, after the death of the late zemindar, the right to appoint a successor was vested in the Government, and that accordingly the Government had granted the said zemindaree to the minor defendant. No grant from the Government was produced. That which is called a sunnud was not a grant creating a new right, but a mere recognition or acknowledgment of an existing title. See the pro-

* 1 W. R. (P. C.) 30.

cedings of the Madras Government (No. 17A, Record, p. 23).

From this document it appears that, upon the death of the late Polligar, the Collector sent a report to the Court of Wards stating among other things as follows:—

"The deceased zemindar, on the day previous to his death, addressed to me a petition, requesting me *to recognize* his brother as his successor to the estate, and to appoint his cousin to manage the affairs of his estate during the minority of his brother.

"The tahsildar was deputed to ascertain the wishes of the widows of the deceased on this point, and to afford information regarding the property left by the zemindar. The tahsildar submitted a statement obtained from the widows, from which it appears that they earnestly request a compliance with the request contained in the petition addressed to me by their husband, but with this modification, that the cousin should conduct the affairs of the estate under the direct control of the first-mentioned widow. The widows admit the genuineness of the petition.

"The deceased left no will. The estate consists of the Marungapuri zemindaree and certain meerasee lands, the assessment of which amounts to Rs. 2,528-8-10."

The above report was submitted by the Court of Wards to Government with a recommendation that the Collector *be authorized to recognize* the brother of the deceased (the defendant in the suit) as zemindar of Marungapuri, and to take charge of the estate. They added (assuming that the family is undivided, as is probably the case): *The brother of the deceased would be the legal heir to the zemindaree, irrespective of the petition or consent of the widows.* Upon that report the Government passed an order, dated September 17th, 1864, that the Court's proposal is approved.

It also appears that, after the death of the father of the late Polligar, Tirumalai, the Collector reported that the deceased left one son Tirumalai, *the heir to the estate*, and one son, the present defendant, a little boy by his fifth wife, then three years of age, and he recommended that Tirumalai should be recognized and invested as Polligar in the room of his father (Record 32). Upon which the Government ordered that Tirumalai should be recognized and placed in charge of the estate.

In England, proof of the possession of land or of the receipt of rent from the person in possession is *primâ-facie* evide of a seisin in fee.

In India the proof of possession receipt of rent by a person who pays land-revenue immediately to Government *primâ-facie* evidence of an estate inheritance in the case of an ordin zemindaree. The evidence is still stronge it be proved that the estate has passed, one or more occasions, from ancestor to h (see 14 Moore's Indian Appeals 2 There is no difference in this respect betwe a polliam and an ordinary zemindaree. T only difference between a polliam or zem daree which is permanently settled and that is not is that, in the former, the Gove ment is precluded for ever from raising revenue; and in the latter, the Governme may or may not have that power.

The history of the polliams of Souther India is well known. It is to be found the Fifth Report from the Select Committe from the House of Commons on the Affai of the East India Company, presented 1812, a work of great research, and in t Madura Manual, complied by Mr. Nelson the Madras Civil Service, by order of t Government of Madras.

The account given in the Fifth Repo was adopted in the judgment pronoun ced Lord Kingsdown in the case above quoted, which it was held that a polliam was ancestral estate in the nature of a raj.

Looking at the evidence in the cause wit reference to the tenure of the polliam i question, their Lordships have no doubt tha the High Court arrived at a correct conclu sion, and that the polliam is an ancestral hereditary estate.

The question as to the legitimacy of the minor defendant, and his right to inherit, if the estate of his brother was an estate of inheritance, was found by the High Court in his favour, and that decision has already been upheld by their Lordships in the widow's appeal. The legitimacy of the minor having been upheld, the suit of the widow was properly dismissed, for whether the estate was one of inheritanc or one merely for the life of her deceased husband, with a right on the part of the Government, on his death, to appoint a successor, the widow could have no right to succeed. The decree of the High Court, was correct, and, even if the point raised by the Collector on the part of the Government were decided in his favour, the decree dismissing the widow's suit must still be upheld. Their Lordships have alread

ed that they will humbly recommend r Majesty that the decree of the High urt be affirmed with costs.

As the point raised by the Collector was of importance, and necessary to be ided with reference to the costs of the llector's appeal, their Lordships have rd that question argued; and having y considered the very able and elaborate uments of the learned Counsel on both es, they have arrived at the conclusion t beyond all doubt the decision of the gh Court was correct, and they will there- e humbly recommend Her Majesty, with erence to the Collector's appeal, that the ree be affirmed, and the appeal dismissed h costs.

The 18th March 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Act VIII. of 1859, s. 246—Appeal—Religious Endowment—Debuttur Land.

Case No. 5 of 1874.

Miscellaneous Appeal from an order passed by the Judge of the Twenty-four Pergunnahs, dated the 6th January 1874, reversing an order of the Moonsiff of Alipore, dated the 18th September 1873.

Umaye Churn Puteetundee (Decree-holder), *Appellant,*

versus

Jogendro Nath Banerjee and another (Judgment-debtors), *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

Baboos Kalee Mohun Doss and *Mohinee Mohun Roy* for Respondents.

A decree-holder in execution having attached certain lands, the judgment-debtors objected that the lands were not their property, but held by them as shebaits of a religious endowment The Moonsiff found that, although the land formed part of some which had been released by Government as appropriated to religious purposes, they were held by defendants entirely to their own use, and overruled the objection:

HELD that the order was one under Act VIII. of 1859, s. 246, and that no appeal lay to the Judge:

HELD that the mere fact of land having been released by Government on the ground of its being appropriated to the services of an idol does not impose on it the character of a religious endowment, so as to exempt it permanently from being attached and sold in satisfaction of decrees against a person who may hold it.

Jackson, J.—THE appellant in this case is the holder of a decree against the respondents Jogendro Nath Banerjee and another, and in execution of that decree he proceeded to attach and sell certain lands in the possession of his judgment-debtors, whereupon the defendants raised the objection that these lands were not their property, but were held by them in the quality of shebaits, and belonged to the endowment of the temple of Kalee at Kaleeghat, near Calcutta. On that the Moonsiff proceeded to inquire whether these lands were in fact held as alleged, and he found that, although the lands to which the question related formed a portion of the lands which had been released by Government as being appropriated to religious purposes, in point of fact these lands and other such lands had been and were held by the defendants, as by others of the fraternity, entirely to their own uses, and had been in fact alienated and dealt with by them at their pleasure, being in that way quite distinct from the lands definitely held for, and devoted to, the service of the idol. Accordingly he held that the judgment-creditor might seize and sell the property in question in satisfaction of his decree. On appeal to the District Court, the Judge reciting that it appears from the judgment of the Moonsiff that both parties admit that this land was set apart for the purposes of religious worship, and that the debtor holds the land as a trustee who is bound to devote the proceeds to those purposes, and, stating then that the Moonsiff finds on the evidence that in point of fact the proceeds are not so applied, but that the interest in it is conveyed from one member of the priesthood to another, observes: "It "is clear that, if the debtor holds the land as "a trustee, he has no interest in it which the "decree-holder can put up to sale. It is also "clear that as the land has been devoted to "the provision of the means of conducting "the religious services, the mere misconduct "of, and fraudulent misappropriation of the "proceeds by, the priest or other person "cannot affect the matter or render the land "liable to sale. If the judgment-debtor "misapplies the proceeds, he would be as "liable to punishment as if he embezzled "money offerings, but the Court cannot say "that it will treat the land as the property "of a private person, because the priest who "has charge of it has used the money for "his private purposes"

The decree-holder appeals specially to this Court, and contends in the first place that the order of the Moonsiff must be dealt

with as an order under section 246 of the Code of Civil Procedure, and that no appeal lay to the District Court; and, secondly, he contends that the order of the Judge supposing that the appeal lay is erroneous. On the first point, we are referred to the authority of two cases, one in 15 Weekly Reporter, p. 339, and the other in 11 Weekly Reporter, p. 204.

These were cases precisely analogous to the present, and it was held in one case that the order came clearly under section 246, and in the other that it was virtually within the meaning of section 246, and no appeal lay. A class of cases somewhat similar to the present have been lately under consideration. We mean cases in which parties, who had been sued in some representative character and against whom judgment had gone, upon the seizure of property in satisfaction of decree against them, have objected that that property came into their hands, not in the character in which they had been sued, but in their own capacity. These cases, we think, are distinguishable from the present, and we are bound to say that it appears to us more convenient to deal with these cases as orders under section 246 than as orders under section 11, Act XXIII. of 1861. If we were to treat them as orders under section 11, we must hold that a decision of the Court executing the decree otherwise than as reversed or altered on appeal would be final. But it seems clear that it would be competent to any party interested to impugn the conduct of the shebait, and bring a suit for the purpose of establishing the right of the idol. In that view of the case, we should prefer to be bound by the authority of the decisions cited, and to say that there is no appeal to the District Court, but we think in either point of view the decision of the Moonsiff is right, and ought to be maintained. We are unable to acquiesce in the view taken by the District Judge, which, in the first place, is founded upon an inexact statement of what appears from the evidence and the Moonsiff's judgment. Both the parties did not admit that these lands were set apart for purposes of religious worship. What the witnesses stated was that these lands formed part of the lands which the Government had released on the ground that they were appropriated to the services of the idol. We cannot admit that the fact of the land having been released for that reason imposes upon it a character of religious endowment so as to exempt it permanently from being attached and sold in satisfaction of decrees against a person who may hold it. Ca may be easily imagined in which, whate the original use and purpose of the la may have been, they may in time h become detached from those purposes, a have come into the hands of some priv person, and the case might be such tha suit to recover them for the benefit of idol would be barred. It would be idle, think, in that case to say that the right, t and interest of the person in posses could not be sold in satisfaction of a de against him. It is impossible in this c to say what the real state of the facts m be. Whether the right of the idol is in force and vigor at present or not, it is c that the defendants have been using proceeds of the lands, and dealing with th as if they had the full ownership. In state of things, we think there was an in est which the decree-holder was at liberty attach and cause to be sold, leaving question what had been sold to be set ultimately between the purchaser and representative of the idol.

We think the decision of the Moo should be restored, and the order of Lower Appellate Court set aside. Each p will bear his own costs in all the Courts.

The 18th March 1874.

Present:

The Hon'ble W. Markby and E. G. Bir *Judges.*

Kubooleut—Breach of Covenant—Damag

Case No. 1492 of 1873.

Special Appeal from a decision passed by Judge of East Burdwan, dated the April 1873, affirming a decision of the S ordinate Judge of that District, dated 30th December 1872.

Wooma Soonduree Dossee (Plaintiff), *Appellant,*

versus

Raj Kristo Roy and others (Defendants) *Respondents.*

Mr. C. Piffard and *Baboo Rash Behare Ghose* for Appellant.

Baboo Bhugobutty Churn Ghose for Respondents.

kubooleut in which the tenant undertook to preserve
in trees in a jungle, and not to injure them in any
providing that, if he relinquished the talook after
oying the jungle, he would pay Rs. 2,000 as the
of the trees, was construed to contain two distinct
nants, the second being a covenant not to injure the
on breach of which damages could be recovered.

Markby, J.—It appears to us that the
truction which the lower Courts have
pon the kubooleut filed by the plaintiff
t the true construction to be put upon
The words used are these: "I will pre-
ve and possess the trees, &c., which are
will grow in the Rakha Jungle which
ertains to this mouzah, and I will not
re or destroy them in any way. If
linquish the talook after destroying the
gle, or cause it to be sold by non-pay-
nt of rent, I will then pay without
ection two thousand rupees, the value of
trees of that Rakha Jungle." Then
ubstantial question is (as was put by
Piffard) whether this is a single cove-
or two distinct covenants. We think
there are two covenants, the first
e provides for the preservation of the
growing in the jungle, and there is a
ct covenant not to injure or destroy
in any way, so that, upon the breach of
covenant, damages might be recovered.
second clause is that, if after destroying
angle the tenant gives up his tenancy,
the damages which the proprietor is to
titled to recover in consequence of the
being destroyed should be a sum of
2,000, and this special provision was
bly added, because in that case there
be some difficulty in ascertaining the
amount of damage that had been done
e out-going tenant. If (as we may
ably presume) it was the object of the
etor to keep the trees as they were
the estate, that object would be wholly
ted if the trees could be cut down by
tenant during the tenancy without any
ity to a suit for damages. We think,
fore, that there was a separate and dis-
covenant not to cut down the trees, and
covenant having been broken by the
t, the proprietor is entitled to recover
ges from him. The case, therefore, will
manded to the Court of first instance to
ain what damages the plaintiff is entitled
account of the trees having been cut
by the defendant.

The costs of this appeal and of the lower
rts will abide the ultimate result.

The 18th March 1874.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Sale for Arrears of Rent—Liability of Purchaser.

Case No. 1587 of 1873.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 18th April 1873, modifying a decision of the Second Sudder Moonsiff of that District, dated the 24th January 1873.

Beepin Beharee Biswas (Plaintiff), *Appellant,*

versus

Judoonath Hazrah (Defendant), *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

No one for Respondent.

The purchaser of a tenure at a sale for arrears of rent was held to be liable for rent from the date on which the sale was confirmed, for, until such confirmation, he could not obtain the certificate of purchase.

Markby, J.—We think that the decision of the District Judge is right. What he has in substance decided is that the defendant is liable to pay rent for the tenure from the date on which his title to the property commenced. Under the law the sale to the defendant was not absolute, until it was confirmed, and, until the sale was confirmed, he could not obtain that which is in fact a conveyance to him of the property, namely, the certificate of purchase. Upon this ground we think that the District Judge is right in holding that the defendant was liable to pay rent from the date on which the sale was confirmed, that being the earliest date on which he could have obtained possession of the property under his purchase.

That being the only point which arises out of the Judge's judgment, we dismiss the special appeal, but without costs, no one appearing for the respondent.

The 18th March 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Act XX. of 1863, s. 18—Appeal.

Application for the admission of a Miscellaneous Appeal from an order passed by the Judge of the Twenty-four Pergunnahs, dated the 29th November 1873.

Delrus Banoo Begum (Opposite Party), *Appellant,*

versus

Hadjee Abdoor Ruhman and others (Petitioners), *Respondents.*

Baboo Ashootosh Dhur for Appellant.

No one for Respondents.

No appeal lies from an order passed under Act XX. of 1863, s. 18.

Note by the Deputy Registrar.—As the order of the Judge against which this appeal is preferred is not a decree in a suit or an order passed in execution of a decree, which are appealable under the Civil Procedure Code, but is an order passed under section 18, Act XX. of 1863, which is silent as to any appeal, I solicit the orders of the Court as to whether this appeal should be received and registered.

Jackson, J.—We think no appeal lies in this case, and that the application should be refused.

The 19th March 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glo *Judges.*

Suit for Kubooleut—Informal Notice.

Case No. 1293 of 1871.

Special Appeal from a decision passed the Subordinate Judge of Kungp dated the 29th June 1871, reversing decision of the Moonsiff of Buddrakh dated the 6th January 1871.

Shama Soonduree Debia (Plaintiff), *Appell versus*

Degumburee Debia (Defendant), *Respond*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondent.

In a suit for a kubooleut at an enhanced rent, w the defendant in his examination took no exceptio the notice, and his defence was not prejudiced by informality therein, the Lower Appellate Court reve the decision of the first Court (which had decreed claim) on the technical ground that the notice was properly served: HELD that the Lower Appellate C was bound to go into the merits.

Kemp, J.—THE plaintiffs are the spec appellants in this case. They brought a originally for a kubooleut at an enhan rate; in that suit the defendants pleaded mokurruree; the mokurruree was found to not proved, but the plaintiffs' suit for kubooleut was dismissed on the technic ground laid down by the Full Bench th they had sued for less than was found to b due on inquiry. The present suit is fo arrears of rent at an enhanced rate af service of notice. The defendants in th Court below did not state that no notice a all had been served, but alleged that it ha not been served in proper time and in du form.

The first Court overruled these objection and gave the plaintiff a decree. On appe the Subordinate Judge has reversed th decision on the ground that there is no proo that the notice was properly served.

The grounds taken in special appeal are that the Lower Appellate Court should not have reversed the decision on the merits on the technical ground; that the Lower Appellate Court has not taken any notice of the deposition of the defendant in which he does not raise any objection as to the non-service

d

notice at the proper time and in due
m; that the notice is substantially correct;
d, lastly, that the Lower Appellate Court
wrong in saying that the notice is bad,
cause it does not contain the words "same
ss of ryots." A ground has also been
ged in this Court, which was not taken in
e Court below, that even were the Court
hold that the notice was informal, the
aintiffs would still have a right to a
claratory order reciting their right to
hance on issue of fresh notice.

We think this case must be remanded for
al on the merits on the third ground of
ecial appeal, namely, that the Lower
ppellate Court was wrong in not taking any
otice of the deposition of the defendant.
he defendant in this case was examined;
e took no exception whatsoever to the
otice, and objected only to the rates. There-
ore this is a case in which the defendant
nowing perfectly well the grounds upon
hich enhancement of rent was demanded,
nd making no objection in his examination
o the notice as not having been a formal one,
r served in proper time, and his defence not
aving in any way been prejudiced by the
nformality, if any, in the notice, we think
he Subordinate Judge was bound to go into
he merits of the case. We, therefore,
emand the case to the Subordinate Judge for
rial on the merits. Costs to follow the
esult.

The 19th March 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Sale of Putnee—Publication of Notice—Reg. VIII. of 1819, s. 8, cl. 2.

Case No. 214 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 29th July 1872.

Mungazee Chaprassee and others (Defendants), *Appellants*,

versus

Sreemutty Shibo Soonduree (Plaintiff), *Respondent.*

Baboo Sreenath Doss for Appellants.

Mr. G. Gregory for Respondent.

In the case of a sale of a putnee talook for arrears of rent, so long as the cutcherry at which notice on the defaulter, as required by Regulation VIII. of 1819, s. 8, cl. 2, is served, is an adjacent one, in which all the business of the defaulting putnee is carried on, and is on land belonging to the defaulter, publication at that cutcherry is a sufficient publication.

Inadequacy of price is no ground for setting aside a sale regularly held under the putnee law.

Glover, J.—This was a suit to set aside the sale of a putnee talook held under Regulation VIII. of 1819, on the ground that the usual notices required by law had not been served. The plaint is not very clearly worded, but we gather from the record that the plaintiff denied the service of all the three notices required by the Regulation. She alleges, we understand, that neither in the Collector's cutcherry nor in the zemindaree cutcherry were the sale-proclamations published, whilst no notice was published either in the defaulter's cutcherry-house or in any town or village on the land. She admits that arrears of rent were due, but declares that she knew nothing of any steps being taken to realize them under the Regulation. She alleges fraud on the part of her tehsildar, the defendant No. 3, who, she alleges, in collusion with the other defendant, defaulted in payment of the rent, and so caused the estate to be sold; the defendant No. 2 purchasing it at auction at a totally inadequate price. She adds that although her husband, Gooroo Doss, died some time previous to the default, the notices were drawn up in his name, although she, the plaintiff, had succeeded to the property.

The zemindar, defendant No. 1, through his agent, alleges that the notices were all duly served; that the death of Gooroo Doss, the plaintiff's husband, was not known to the landlord; and that as the plaintiff never applied to have her name substituted in his serishta for that of her deceased husband, the zemindar was not bound to issue notice in her name.

The purchaser, defendant No. 2, repeats the defence that the notices were all properly served, and says that the notice to the defaulter was sent to her cutcherry at Oottur Namsee, and received by the tehsildar Kisto Kishore; that the sale was held in the presence of numerous bidders, of whom he, defendant, offered the highest price; and that it was conducted strictly according to law. He adds that the object of the putneedar was to get the tenure sold, and to buy it herself benamee, and so break up the howalahs of the defendant, and get the estate free from incumbrances.

The Subordinate Judge fixed four issues, but only found it necessary to try two of them. He considered, *first*, that the zemindar

was justified in issuing notice in Gooroo Doss' name, inasmuch as the widow had not applied for registration in his serishta; and, *secondly*, that, although the notices at the Collector's office and the zemindaree cutcherry had been duly proclaimed, the notice required by clause 2, section 8 of Regulation VIII. of 1819, to be served on the defaulter in his cutcherry on the spot, had not been served there, but at another cutcherry called Panairtaik, situate within another talook not appertaining to the defaulting putnee. He held, therefore, without going into the other issues, that the sale was illegal, and that the plaintiff was entitled to set it aside.

Against this decision both putneedar and purchaser have appealed, the former under section 348 of the Procedure Code.

The defendant contends that the notice was duly served at the putneedar's cutcherry of Oottur Namsee, and that the finding of the Subordinate Judge that it was not so served is against the evidence; but that even if the notice were not shown to have been served at Oottur Namsee, it was, in the Subordinate Judge's opinion, proved to have been served at Panairtaik, and that service in that cutcherry was a good and sufficient service.

The plaintiff objects to the Subordinate Judge's finding that the preliminary notices were duly served, and also to that part of the judgment which declares that the notice on the spot was served on the tehsildar Kisto Kishore at Panairtaik.

With reference to this part of the case, we think, after having heard all the evidence recorded by the Subordinate Judge, that the fact of general notice such as is required by the first part of clause 2, section 8 of the putnee law, is proved, and that such notice was duly published at the Collector's cutcherry, and afterwards at the zemindar's sudder cutcherry. It has been objected by the plaintiff's vakeel that the only evidence of publication in the Collector's cutcherry is the return of the Nazir, which is no proof of the fact. But this is not quite accurate. There is on the record a proceeding of the Collector in which he declares it proved that the notice required by law had been duly hung up in his cutcherry, and no objection was made to this decision till more than a month afterwards, when the putneedar made an unsuccessful petition to the Commissioner. This notice, however, is a general notice containing the names of all defaulters. Now it is not denied that there were other defaulters at the time plaintiff fell into arrears, or that their names were duly proclaimed at the Collector's cutcherry. All the names would be embodied in one proclamation, and there is no reasonable ground for supposing that the plaintiff's name was omitted. With regard to publication at the zemindar's cutcherry, we see no reason to disbelieve the direct evidence to the fact which satisfied the Subordinate Judge.

Nor are we inclined to differ with him (and this brings us to the defendant's appeal) as to the service at Oottur Namsee. The evidence on this part of the case preponderates heavily in favour of no notice having been served there. Indeed, the Ameen's report, if believed, would be almost conclusive of the fact. We hold that there was no cutcherry-house belonging to the plaintiff at Oottur Namsee at the time the notice was served, and that the business of that putnee was carried on at the cutcherry-house of the adjacent talook of Panairtaik.

Then comes the question, was notice served at that cutcherry; and if so, was it a sufficient notice? On the first point we agree with the Subordinate Judge. There is a great deal of, apparently, truthful testimony as to the fact of the notice having been given to Kisto Kishore, the plaintiff's tehsildar at that place, and Kisto Kishore's receipt for the notice has been filed. No doubt the tehsildar who has been examined denies his signature, but the direct evidence that he signed it is very strong, and the Subordinate Judge, on comparing the signature with Kisto Kishore's admitted signature, found the two to correspond closely. We have not been able to make the comparison for ourselves, as the original signatures have not been sent up with the record; but as the plaintiff, who objected to this part of the Subordinate Judge's finding, took no steps to have the originals sent up, which it was her duty to do if she wished to impugn the lower Court's judgment on this point, we are bound to take the finding of the Subordinate Judge that there was a great similarity between the two signatures as correct. On the whole of the evidence, we think that notice was sent to the Panairtaik cutcherry; that that was the only cutcherry the plaintiff had; and that there she transacted all her zemindaree business: we think also that her tehsildar Kisto Kishore accepted the notice, and that so far the zemindar did what the law directed.

As to the sufficiency of that notice, there has been much argument, and we were at

t inclined to hold that the words of the tion, "to be similarly published at the cherry, or at the principal town or village n the land of the defaulter," made it erative that the cutcherry at which notice to be served (where it was served at a cherry) should be "upon the land which the subject of the default;" but the ning of the sentence is not absolutely clear. e comma after the word cutcherry gives, doubt, considerable strength to the argu- nt of the defendant that the cutcherry d not be on the land which is the subject he default, but may be on any other land property of the defaulter. And there is decision of the late Sudder Court—Loot- nissa *vs.* Kooer Ram Chunder and others, D. A. Decisions for 1849, p. 371—in ich the same construction of the section declared. I do not desire, therefore, to hold my first impression, especially as it is ferred to the opinion of my learned brother mp. At all events, I am prepared to hold h him so far that so long as the cutcherry which notice on the defaulter, as required the Act, is served, is an adjacent one, in ich all the business of the defaulting nee is carried on, and is on land belonging the defaulter, publication at that cutcherry a sufficient publication—the object of the w being to give information to the tenant arrear.

We are of opinion, therefore, that the sale s not vitiated by any defect of notice, and t the Subordinate Judge's decision was ong.

There is no necessity for our going further. hen the case was heard, neither party ished to adduce any additional evidence on e 3rd or 4th issues, and there is nothing the record that can be said to prove the legation of fraud put forward by the plaint- f. Inadequacy of price, supposing the ct to be so, of which we have no proof, ould be no ground for setting aside a sale egularly held. The law does not compel idders to give a fair price; it is sufficient if otice is given to intending purchasers that e sale is going to take place. Moreover, the rice paid by the defendant No. 2 is almost qual to twelve years' purchase of the rental, which, although it may be a low price, cannot e called an altogether inadequate one.

The plaintiff's cross-appeal is dismissed, nd that of the defendant allowed. The ubordinate Judge's order is set aside, and he sale declared to be valid. In other ords, the suit of the plaintiff will be ismissed, with costs in all Courts.

The 19th March 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act XXVII. of 1860—Mahomedan Law—Residuaries.

Case No. 403 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Judge of Sylhet, dated the 26th July 1873.

Mahomed Haneef, *Appellant,*

versus

Mahomed Masoom and others, *Respondents.*

Moulvie Syud Murhamut Hossein and *Moonshee Serajul Islam* for Appellant.

No one for Respondents.

Under the Mahomedan Law, the succession of residuaries in their own right is as unlimited in the collateral as in the direct line, where it is expressly said to be how low and how high soever.

Kemp, J.—It is unfortunate in this case that nobody appears for the respondent, inasmuch as we should like to have had an argument on the point. It appears that the appellant before us applied for a certificate under the provisions of Act XXVII. of 1860, alleging that the deceased Mahomed Anees died leaving debts due to him amounting to Rs. 400. The application was opposed by Mahomed Masoom, Mahomed Munsoor, and others. They alleged that Mahomed Anees died leaving a widow and a sister Tumeeza; that the widow and sister are now dead; and that they as the heirs of Tumeeza are entitled in preference to the applicant to a certificate. The Judge in a very short decision states that the applicant has no standing according to the Mahomedan Law to apply for a certificate under the provisions of the Act; that the applicant claimed that Nyamut was his paternal ancestor in the 5th degree, the said Nyamut being the common ancestor of himself and of the deceased Mahomed Anees in the 6th degree. The Judge, however, holds that such tracing back

is not recognized under the Mahomedan Law, and therefore rejected the application of the petitioner.

In appeal, it is contended that the Judge is wrong, and that the Mahomedan Law has been misunderstood by him. On referring to Baillie's Digest of Mahomedan Law, we find that the detail of residuaries is not carried further in any of the authorities than the uncles of the grandfather, but that it would have been superfluous to do so, as the grandfather had been already defined to be a father's father how high soever, so that the detail is in reality co-extensive with the definition, and the succession of residuaries in their own right as unlimited in the collateral as it is in the direct line, where it is expressly said to be how low and how high soever; and certain cases have been quoted—Bhanoo Bibee *vs.* Imam Bux, S. D. A. Rep., Vol. I., and also two Madras cases.

We, therefore, reverse the decision of the Judge, and direct that a certificate be granted to the petitioner. The Judge, if he deem it advisable, will take security from the petitioner under the provisions of the Act. The appeal is decreed with costs. Pleader's fees—one gold mohur.

The 19th March 1874.

Present:

The Hon'ble Louis S. Jackson, *Judge.*

Putnee Lease—Abatement of Rent.

Case No. 720 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 27th November 1872, modifying a decision of the Sudder Moonsiff of that District, dated the 30th January 1872.

Gour Mohun Roy (Plaintiff), *Appellant,*

versus

Radha Ramun Singh (Defendant), *Respondent.*

Baboo Doorga Doss Dutt for Appellant.

Baboo Gooroo Doss Banerjee for Respondent.

In a suit by a putneedar to recover rent in accordance with the terms of a durputnee lease, the defendant claimed an abatement of his putnee rent on the ground that his predecessor had obtained such abatement in a previous rent-suit, in which it appeared that the lessor's share was slightly less than what was described in the lease:

HELD that, unless defendant could show that he had been damaged by plaintiff's misrepresentation as to the extent of his share, he could not be relieved from his contract, at least in this shape.

THE defendant in this case took from the plaintiff a dur-putnee lease of the plaintiff's share in a certain mehal which share was stated to be 4 annas 1 gundas 1 cowrie 1 krant. It appears that at the time when this contract was entered into, there was a subsisting ijara of the same share granted to Mr. Hills, and the defendant would not be entitled to obtain khas possession until the expiry of Mr. Hills' ijara. The plaintiff suing to recover rent from the defendant in accordance with the contract, the defendant objected, among other things, that in a previous suit for rent by the mother of the plaintiff against Mr. Hills, the ijaradar, it appearing to the Court that the lessor's share was slightly less than what was described in the lease, *viz.*, less by 2 gundas 2 cowries 2 krant, Mr. Hills had obtained an abatement of his rent to that extent. The defendant claims the benefit of that decision, and insists that he also is entitled to an abatement of his putnee rent. It is not necessary, for the purpose of the present case, to consider whether the judgment, as between Omma Moyee, the plaintiff's mother, and Mr. Hills, was correct or not. No appeal has been made, and the parties have chosen to be satisfied with it. The question now is whether the defendant was entitled to the abatement which has been given to him by the Courts below. The defendant has been called upon to show any authority for such reduction. It does not appear that, either in the present suit or in the suit against Mr. Hills, any evidence was given as to what the lessee had got possession of, nor did Mr. Hills or the present defendant take any steps to be relieved of their contract. It appears to me that unless the defendant can show that he had been damaged by the misrepresentation of the plaintiff as to the amount of his share, the Court ought not to relieve him from his contract, and that he is not entitled to ask for relief at any rate in this shape. It appears to me that the judgments of the Courts below ought to be modified, and the plaintiff is entitled to rent according to the terms of the kubooleut. I make no order as to costs.

The 19th March 1874.

Present:

The Hon'ble Louis S. Jackson, *Judge.*

Erection of House on Joint Land—Co-owner's Remedy.

Case No. 2606 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of the Twenty-four Pergunnahs, dated the 29th April 1873, affirming a decision of the Moonsiff of Diamond Harbour, dated the 22nd May 1872.

Massim Mollah (Defendant), *Appellant,*

versus

Panjoo Ghoramee (Plaintiff), *Respondent.*

Baboo Doorga Ram Bose for Appellant.

Baboo Taruch Nath Dutt for Respondent.

In a suit to obtain an order for the demolition of a house erected on land, the joint property of plaintiff and defendant, even though, in strictness, defendant had no right to erect the house without the consent of his co-owner, the Court ought to inquire whether, under all the circumstances, the ends of justice cannot be satisfied by some other remedy.

THE plaintiff in this case sued to obtain an order for the destruction of a house erected by the defendant upon land which the plaintiff alleged to be the joint property of both, and it appears that in this land, according to the plaintiff's statement, the plaintiff's interest was to the extent of one-third, and the defendant's to the extent of two-thirds. The defendant, however, alleged that the house had been erected upon land belonging to him exclusively. The case seems to have undergone a good deal of inquiry, two Ameens having been sent to the spot; but the upshot of it has been that the Courts below have found the land upon which the hut stood to be the joint property of the plaintiff and the defendant, and thereupon, considering that the defendant had no right to erect the hut upon the land without the consent of the other party, they gave the plaintiff a decree. The Moonsiff's words are: "I hold that the "defendants have appropriated to their own "use an average area of one hatta of land "out of the lands of dag 42 by raising a hut "and mud wall over it. The defendants "have no right to turn to their own use any "portion of the ijmalee land without the "consent of the plaintiff." This decision has been affirmed by the District Judge. Now, no doubt, in strictness, the defendant, not being the sole owner of the land, had no right to erect the house thereupon without the consent of the co-owner, but then, the house having been so erected, the assertion of the plaintiff's strict right might be attended with loss to the defendant, which would be out of proportion to the relief which the plaintiff was entitled to ask for. It was pointed out by the late Chief Justice in a case* in 3 Bengal Law Reports, App.,

* The 20th May 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble F. A. Glover, *Judge.*

Case No. 404 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 21st November 1868, affirming a decision of the Moonsiff of Sursa, dated the 14th February 1868.

Lalla Bissambur Lall (one of the Defendants), *Appellant,*

versus

Rajaram (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Appellant.

Baboos Romesh Chunder Mitter, Mohesh Chunder Chowdhry, and *Doorga Doss Dutt* for Respondent.

Peacock, C. J.—ONE issue raised by the Subordinate Judge was "whether the said land being joint, the defendant's erecting a wall of the house over the said joint land is valid, or whether the said wall ought to be demolished." He then, in his judgment, proceeds to show that the land is joint, and he says that "in compliance "with what has been above alluded to, it is proved that "the said land is conjointly held by both parties; then, "under these circumstances, the defendant's erecting a "wall of his house on the conjoint land without the "accord and consent of the plaintiff is by all means "unlawful—nay the said wall is fit to be demolished; "therefore it is ordered that the appeal be dismissed," the substance being that the wall was to be demolished. It appears to me that, even if the defendant had not a strict legal right to build the wall upon the joint land, that this is not a case in which a Court of Equity ought to give its assistance for the purpose of having the wall pulled down. A man may insist upon his strict rights, but a Court of Equity is not bound to give its assistance for the enforcement of such strict rights.

It appears to me that this is a case in which, apparently, no injury to the plaintiff has been caused by the erection of the wall, and that, therefore, the plaintiff ought to be left to such remedy as he may have without applying to a Court of Equity for assistance in having the wall demolished. He may, if he think fit, apply for a partition; but I do not think that it would be equitable, after the defendant has gone to the expense of building the wall upon the land of which he was a joint owner, to have that wall demolished at the suit of his joint co-sharer without showing that it causes any injury to the petitioner.

Under these circumstances, I think that the appeal ought to be allowed, and the suit of the plaintiff dismissed with costs.

Glover, J.—I concur.

page 67, that parties cannot be allowed, under all circumstances, to ask the assistance of the Court in enforcing their strict legal rights. The Courts below ought to have inquired whether, it being admitted that the land was joint, the circumstances were such that the plaintiff was entitled to insist upon the demolition of the hut. They should have referred to the conduct of the plaintiff at the time when the house was erected, to the possibility of affording the plaintiff relief of other kinds by dividing off his undisputed share of this land or otherwise, and considered whether, under the circumstances of the case, the ends of justice required that the house should be pulled down. The case must go back to the Lower Appellate Court in order that these points may be inquired into, and a fresh decision arrived at. I think, under the circumstances, that both the parties to the suit should be examined in Court.

The 20th March 1874.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Construction—Limitation.

Case No. 1788 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of East Burdwan, dated the 15th May 1873, affirming a decision of the Moonsiff of Cutwa, dated the 24th February 1873.

Mussamut Bibee Efatoonnissa (Plaintiff), *Appellant,*

versus

Khondkar Khoda Newaz and another (Defendants), *Respondents.*

Mr. Ameer Ali and *Moonshee Abdool Baree* for Appellant.

Baboos Taruck Nath Sen and *Umbika Churn Banerjee* for Respondents.

In a suit to recover money lent upon a mortgage which defendant refused to register, defendant put a construction upon the arrangement which was accepted by the Court, and the claim dismissed as premature: HELD that, when plaintiff sued again in due (*i. e.*, mature) time, it was not open to the parties or to the Court to say that the first construction was wrong.

Markby, J.—It appears in this case that the suit is brought to recover a sum of money lent by the plaintiff to the defendant. The money was lent upon a mortgage made by the defendants to the plaintiff by way of conditional sale, and the defendants having refused to complete their mortgage by registering the conditional sale, the plaintiff brought a suit to recover the money at once. It was then held that, as the money was not due under the arrangement between the parties until 1276, that suit was premature and must be dismissed. On the plaintiff now bringing her suit again after 1276, it has been dismissed on the ground of limitation; and the ground of limitation taken appears from the judgment of the Moonsiff. He says that, on the defendants refusing to register the deed, the plaintiff could have either enforced registration by following the procedure laid down in the Registration Law or she could have sued for the refund of the consideration-money for breach of contract; but he says that in the latter case her cause of action arose directly when the defendants refused to register the document and so render the mortgaged property, and that it is therefore now barred. Now the result is that, that, whereas, in the former suit between the same parties, one construction was put upon this arrangement, namely, that the debt was not due until 1276, a contrary construction is now put upon it by another Judge in deciding a suit between the same parties, namely, that the money was due at the time when the arrangement was made. That is the thing which cannot be done. Whether the decision in the first case was right or not, it is not necessary (as it seems to me) for us to consider. The defendant, upon the former occasion, put forward what he considered to be the true construction of the agreement between the parties. That was accepted by the Court which then tried the suit as the right construction, and it is not open now to the parties to say that that construction was wrong, nor is it open to the Court to say so. That decision is binding as between these parties, and it must be acted upon.

The result is that the suit will have to be remanded to the Court of first instance to be re-tried upon the other issues, the issue on the question of limitation being decided in favour of the plaintiff. Costs of this appeal and of the lower Courts will abide the ultimate result.

The 23rd March 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Attachment under Act VIII. of 1859, s. 81—Compensation under s. 88—Damages—Estoppel—Jurisdiction.

Reference to the High Court by the Judge of the Small Cause Court at Furreedpore, dated the 24th January 1874.

Goburdhun Majhee and another, *Plaintiffs,*

versus

Banee Chunder Doss, *Defendant.*

Certain moveable properties, fishing nets, &c., having been attached under Act VIII. of 1859, s. 81, the suit was eventually dismissed and costs awarded to defendants, who thereupon sued plaintiffs to recover damages sustained consequent on the attachment, *viz.*, 1st, for what could have been earned by means of the fishing nets had they not been under attachment; and 2nd, for injury suffered by the nets owing to carelessness and exposure:

HELD that the suit was properly cognizable in the Small Cause Court, and the Judge at liberty to take into consideration both elements of damage. Such a suit would only be barred when compensation had been awarded under s. 88.

Case.—PLAINTIFFS, it appears, were sued by the defendant in the Magoora Small Cause Court for recovery of an amount due on a bond, and certain moveable properties, inclusive of six fishing nets of different sorts, were attached under section 81 of the Civil Procedure Code for the security of the realization of the amount of the decree that might be passed in their favour. The suit was ultimately dismissed and costs awarded to the plaintiffs, the defendants in that case. Plaintiffs now come to this Court to recover damages sustained consequent on the attachment alluded to. The damages are divided into two heads: *1stly*, the amount which the plaintiffs could earn, during the period the properties were under attachment, with the aid of the nets, had they not been deprived of them; *2ndly*, the value of the nets which are said to have been deteriorated in value or become quite useless by reason of being exposed to damp, and no caution being taken to preserve them from the injury done by mice. The defendant pleads that this case is not maintainable in this Court and in its present form.

With regard to the last head of the claim, it appears to me that if anybody was to be responsible for any damage done to the nets during the period of attachment, it was the officer of the Court to whose custody they were placed. Section 233 of the Civil Procedure Code is clear on the point. To argue that the defendant having caused the nets to be maliciously attached, the plaintiffs can look to nobody other than the defendant for any damage done to their property in consequence of the attachment, seems inconsistent with reason. True, the party attaching another's property is liable generally for damages accruing out of the act of attachment, but not, I am not inclined to believe, for any injury done to the attached property while in custody of an officer who is specifically responsible for the due custody thereof, and whose neglect or want of caution can only hold against himself, without affecting the party at whose instance the property was attached, and who was quite innocent in respect of the injury complained of. It being so, the officer of the Court, who had had the custody of the properties, has not been made a defendant in the cause, nor is he amenable to this Court. I think, therefore, that the defendant is not liable for that part of the claim accruing from the alleged injury to the nets while under attachment; and if liable at all along with the attaching officer, the case is defective for want of a necessary party to the suit.

It is not without some diffidence that I express my opinion with regard to the first head of the claim. There can be no question as to the liability of the party attaching property, if the attachment is brought about maliciously, and the law (section 88, Act VIII. of 1859) invests the Court by order of which the attachment is made with discretionary power to award compensation, on application, to the aggrieved party, if it shall think it fit, on the dismissal of the case. The plaintiffs in this case have not availed themselves of that opportunity. They are nevertheless entitled to sue for damages notwithstanding their failure under the section quoted. But then the question is in what Court should they seek redress. If the awardal of damages were imperative in case of a dismissal of a suit on whatever ground it may be, any Small Cause Court within the jurisdiction of which the defendant might reside could have jurisdiction in the cause. But it is not so. Malice is the basis of such an action. The cause is obvious. A suit may be dismissed on being proved to be false, or for want of sufficient proof of fact. In the former case the attachment *per se* is malicious, and in the latter something yet remains to be seen whether it was malicious or not, and that

was the reason why the Legislature invested the Courts with discretionary power to be exercised as occasion may seem fit. The Court which decides the case is the proper Court to exercise that discretion. But when, instead of resorting to the section (88) referred to, the aggrieved party brings a regular suit, does not such a suit involve a long and intricate investigation? I think it does; and if so, is it not consistent with reason that the investigation should take place where the cause of action arose, and consequently in the Moonsiff's Court, which is alone competent to try the point, both for its intricacy and convenience of all parties concerned? A suit for damages sustained in character by a false charge, even when actual pecuniary loss is caused by way of absence from labour consequent on attendance during the investigation of the charge, is not cognizable by a Small Cause Court, merely because, I suppose, the malicious nature or otherwise of the charge is required to be proved, and because the damages are general and not specific. The same analogy may be drawn in this case, where the malicious nature or otherwise of the attachment is in question, and the assessment of the damages unliquidated. I say unliquidated, because the earning by capture of fishes is varied, and there is no fixed date by which the assessment is to be calculated. It is also doubtful whether any deduction on account of labour is to be allowed when the action of the defendants in attaching the nets did not interfere with it, and when the labour is an essential element to bring about the gross income claimed as damages. Under these grounds I think this Court has no jurisdiction to entertain this case. While going to decide the case, I was requested to refer the matter to the High Court and reserve judgment until receipt of the order of the Court. As the matters are important I agree with the plaintiff's pleader to submit the case for the opinion of the Court, but do not see the necessity of reserving my order, as it should merely be contingent on the order of the Hon'ble Court. The suit is therefore dismissed with costs contingent on the order of the High Court.

The judgment of the High Court was delivered as follows by—

Jackson, J.—We are unable to agree in the view taken by the Small Cause Court Judge. We think that this suit was properly cognizable in that Court, and that the Judge was at liberty to take into consideration both the elements of damage stated in the plaint. The circumstance that by law the officer of the Court which orders an attachment is responsible for the due custody of the property attached is a matter which is not decisive in the present case, and certainly does not exonerate the plaintiff at whose improper solicitation the attachment was made. Section 88 contemplates a summary award of compensation by the Court which orders the attachment, and such compensation is to be given for the expense or the injury occasioned to the party by the attachment of his property. That seems to include both the injury accruing to him by the loss, for the time, of the use of such property, and also for the deterioration of the property attached, and it is only when compensation has been awarded under that section that a suit for damages in respect of this property is barred. In such a case as this it is not necessary for the Court which tries the suit to determine or specify absolutely under what head it awards damages. The Court may take all the circumstances into consideration, and give the whole award such sum as it considers proper.

The 23rd March 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Attachment of Judgment-creditor's Interest in a Decree—Reference by Small Cause Court—Act XI. of 1865, s. 22—Act X. of 1867.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Kanaghat, dated the 27th August 1873.

Kaminee Soonduree Chowdhrain (Plaintiff), *Decree-holder,*

versus

Mudhoo Soodun Mookerjee (Defendant), *Judgment-debtor.*

A Deputy Collector having made a requisition upon a Small Cause Court for attachment of the right and interest of the judgment-creditor in a decree passed by that Court, the Judge entertaining doubts as to the validity of such attachment referred the question to the High Court:

HELD that there was no authority for making or entertaining the reference, which did not arise either under Act XI. of 1865, s. 22, or under Act X. of 1867.

Case.—THE Deputy Collector of Kanaghat having made a requisition under Sec-

n 9, Act VIII. (B. C.) of 1862, for attachent of the right and interest of the judgment-creditor* in the decree passed by this ourt in this case, and the Court enterining doubts of the validity of such tachment, addressed on 29th July the eputy Collector in the following terms:— In giving effect to the requisition contained in your vernacular proceeding of 25th instant, I have but discharged a ministerial function. Your requisition has apparently been made under section 9, Act VIII. (B. C.) of 1862, in your executive capacity. A decree is part and parcel of the record of a Court, and the right and interest of the judgment-creditor in it can only be attached and sold under the provisions of the Imperial Act VIII. of 1859 in execution of a decree. The powers conferred by section 9, Act VIII. (B. C.) of 1862, are limited to distraint and sale of moveable property in the possession of the defaulter. An attachment is a process issuing from a Court, and the powers of distraint are exercised under sanction of law by other than a forum. As I entertain doubts of the validity of the attachment ordered by you, I would be glad to be favored with your views on the subject at an early date." Whereupon the same functionary in his capacity as Deputy Magistrate solicited instruction from the Magistrate whether he could "distrain and sell the right and interest of a decree-holder in a decree of the Small Cause Court as a moveable property under section 9, Act VIII. (B. C.) of 1862." The Magistrate was of opinion that "a decree may be attached as moveable "property for arrears of zemindaree dâk "tax."

* From whom dâk tax is due.

My views in the matter are already expressed in my communication of 29th July afore quoted, and I would here only add that although a decree falls within the definition of property liable to attachment under section 205, Act VIII. of 1859, yet it is liable only to attachment and sale in execution of a decree.†

It has already been laid down by the Hon'ble High Court in the case of Prince Golam Mahomed, 15 W. R. 34, that "a "decree for money may be considered as "consisting of two things—

"*1st.*—The debt due from the judgment-"debtor by the decree-holder.

"*2nd.*—The security for that debt by a "decree which renders it capable of being "enforced."

The attachment of a decree is to be made under section 237, Act VIII. of 1859, by a *Court*, and the action of the Deputy Collector in the matter was not in his judicial but executive capacity.

A decree is the highest legal evidence of a debt that can be produced and possessing worth, because it is able to persuade a Court to realize the specified sum from the debtor, and it has been held* "that a Court charged with the execution of a decree has no other discretion with regard to noticing a transfer thereof than that which is given to it by section 208 of the Civil Procedure Code." The opinion of the Hon'ble Court is solicited as to the validity or otherwise of the attachment of the Deputy Collector; and if the Hon'ble Court holds that the attachment is invalid, the purchaser of the decree can take nothing by his purchase.

The judgment of the High Court was delivered as follows by—

Jackson, J.—There is no authority for making or entertaining the present reference. It does not arise either under section 22, Act XI. of 1865, or under Act X. of 1867. It is clearly more convenient that the question raised should be decided between the parties interested in a suit brought for the purpose.

The 23rd March 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Private Arbitration—Act VIII. of 1859, s. 327.

Reference to the High Court by the Judge of the Small Cause Court at Backergunge, dated the 19th July 1873.

Nader Ali and others, *Plaintiffs,*

versus

Majoo, *Defendant.*

In the case of a private award, where the arbitrators granted a new trial, and eventually disposed of the case

† 10 Weekly Reporter 357.

* 10 Weekly Reporter 355.

in the absence of the defendant, and, after one year from the time of allowing a new trial, one day verbally pronounced their judgment to one party, and on another day to the other party, and on a subsequent date wrote out the award which was signed on a particular date by one arbitrator, who sent it to others elsewhere for signature on a different date:

HELD that the award ought not to be enforced under Act VIII. of 1859, s. 327.

Case.—I HAVE the honour, under section 22, Act XI. of 1865, respectfully to submit the following for the opinion of the Hon'ble Court:—

I beg most respectfully to state that in these three cases, which are instituted by different plaintiffs against the same defendant, both parties in each of them, according to *ochulnamah*, or by instrument in writing, had agreed that the matter in dispute in those cases shall be referred to the arbitration of three arbitrators named therein. This deed in each case is addressed to the arbitrators, and proceeds in the following terms:—"We both parties on "one consent file this *ochulnamah* before "you, and beg that, after taking our statements "and proofs, you do settle the matter in dis- "pute between us in this suit for money claim. "We will abide by the judgment and order "which you will thus pass in this case, "just in the same manner as if it were an "adjudication made by ourselves."

It appears from the arbitration awards that the arbitrators, after taking the statements of both parties and the proofs of plaintiffs, had at first given their awards in favour of the plaintiffs; on which the defendant had applied for a new trial which was granted, but as since after that time the defendant did not any more appear before the arbitrators with his proofs, though frequently time was allowed to him, the arbitrators, after awaiting a year, at last again gave decrees in the new trial in favour of the plaintiffs against the defendant, in whose absence they one day verbally pronounced their judgments before the plaintiff, and on another day likewise before the defendant, and then on a third day one of the arbitrators wrote out the decision and signed it, and on another date sent the award for signature of the other arbitrators, who at that time were at different distant places.

The present suits under reference are brought under section 327, Act VIII. of 1859, to enforce the above awards of private arbitration.

Defendant's pleader cites the precede quoted in the marg to show that the Co cannot act upon su awards which we not signed by all the arbitrators at one ti and in the same place. Besides, the awar filed are not the original ones, but those giv on the new trial, to grant which the arbitrato were not empowered under the *ochulnam* The new trial was allowed to proceed in t absence of the defendant, and the judgme in every case was verbally pronounced the different parties at different times a reduced to writing some days after, whi procedures are illegal, and any arbitrat award made under such illegal proceed should not be enforced by the Court.

11 Weekly Reporter, p. 433, case of Rajah Joy Mungul, dated 5th May 1869.

Plaintiff's pleader in reply urges that t precedent quoted by the adversaries' plead refers, not to private arbitration, but only cases where the arbitrators are appointed sanction of Court. Hence it is of no mat if the present awards given by priv arbitration were not signed by the arbitrat at the same time and in the same pla Courts of Justice sometimes verbally pr nounce their verdict, and afterwards wr out their judgment, which does not viti their proceedings. And the arbitrators ha acted more conscientiously and justly granting review of their own judgme which might have been erroneous at fi and rectified in the second trial, to do whi there is no prohibition in the *ochulnam* When the parties have agreed under it t abide by the judgment and decision of the arbitrators, it includes final judgment whether given on first or second trial of the cases, and therefore the Court should not refuse to enforce the awards filed.

It is true that none of the grounds mentioned in section 324, Act VIII. of 185 *viz.*, corruption or misconduct on the part of the arbitrators, is imputed to set aside thei awards. But I concur with the defendant's pleader in saying that the proceedings of the arbitrators have been very irregular and inconsistent with the terms of the *ochul namah*. The arbitrators have granted new trial of the cases, and eventually disposed them of in the absence of the defendant, which is beyond the authority granted to them by the deed of *ochulnamah*. I could not find any written application praying for new trial by defendant, or any written order or notice in the arbitration records inspected by me that time to adduce proof was frequently given to defendant, as stated by the

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trators in their awards. After one year n the time of allowing new trial, they one verbally pronounced their judgment to one ty, and on another day to the other party, in some subsequent date wrote out the gment or award, which was on a particular e signed by one arbitrator, who sent it to ers, who were at different distant places, signature on another date. Such pro-dings appear to me very irregular on the e of the awards, and also as disclosed by evidence of the arbitrators whom I have mined. I have, under the above circum-ces, refused to enforce the awards, and missed the suits contingent upon the ion of the Honorable Court as provided ection 23, Act XI. of 1865.

Plaintiff's pleader had also requested me remit the cases to the arbitrators to sub-their awards after holding their inquiries rding to procedure consistent with law, rovided in the latter part of section 323, VIII. of 1859; but, from the wordings of latter part of section 327, I understand n only refuse to enforce such award nst which any sufficient cause is shown, I do not consider that, with respect to ate awards, I can exercise the powers er section 323, specially when there is uch provision in the agreement originally rring these cases to arbitrators. I accord-y refused to remit the cases to the trators, who were not appointed under ction of the Court, and on this the ntiff's pleader has made application to me refer for the opinion of the Honorable urt the following questions which have en in the disposal of these cases, *viz* :—

1st.—Whether, under the circumstances ted before, the arbitrators have so acted ond their authority, or their proceedings e been so irregular that, according to the t part of section 327, Act VIII. of 1859, may be considered sufficient cause been shown against the awards which in sequence cannot be filed and enforced.

2nd.—Whether the Court is vested with ers to remit an award made by private tration in the manner that it can do under ion 323 with respect to award made by trators appointed under sanction of Court.

As pending the opinion of the Honorable urt the execution of these cases have been poned, an early decision on the points ed is therefore most respectfully solicited.

Judgment of the High Court.

Jackson, J.—We are of opinion that the rds in these cases ought not to be orced under section 327.

The 23rd March 1874.

Present :

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Rent-suit—Disputed Title—Small Cause Courts—Jurisdiction.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Sealdah, dated the 6th September 1873.

Khudeeram Biswas (Plaintiff), *Appellant,*

versus

Koral Budonee Dossee and another (Defendants), *Respondents.*

In a suit for rent of a holding which plaintiff alleged to be included within certain homestead land which he owned in virtue of a sale-certificate in execution of a decree, defendant urged that the said holding was expressly excluded from the certificate. Plaintiff contended further that defendant had agreed to pay him rent for the land in dispute:

HELD that the material issue was as to the alleged agreement, and that, if the plaintiff failed to prove it, the issue would be as to whether the land belonged to him or to the defendant, and would require to be settled in the Civil Court.

Case.—I HAVE the honor respectfully to solicit the instructions of the High Court on the following questions:—

Khudeeram Biswas, the plaintiff, sues Koral Budonee Dossee and her son-in-law, Khettur Mohun Dey, for Rs. 67, being 33½ months' rent of a holding within a tract of 10 cottahs homestead land. The plaintiff claims to own this land (inclusive of the present holding) in virtue of a sale-certificate of the Alipore Judge in execution of a decree. The defendants on the other hand say that the land on which they dwell consists of 1⅓ cottah pertaining to the above tract, and that, in pursuance of an interlocutory objection of theirs, these 1⅓ cottah of land were expressly excluded from the purview of plaintiff's sale-certificate. The decree and sale took place in the summer of 1870.

Further, the plaintiff maintains that the excluded 1⅓ cottah form a different piece of land from that for whose rent he is now suing. He also alleges that, at the time when he received formal possession from the

Judge's Nazir, the defendants were living on his 8½ cottahs;* that then and there he served on them a notice to quit; and that the defendants then agreed to pay rent to the plaintiff. The defendants deny this.

* 10—1½=8½.

The present case, therefore, forms a corollary to an antecedent decree of another Court, and it turns on the circumstances of the execution of that decree, *viz.*, how the 1½ cottah to be excluded were defined.

I have inquired carefully into the nature of the demarcation so as to make sure that the question of title was a *bond-fide* one on the part of the defendant. It appears that no measurement or definite demarcation of the excluded tract took place: only 1½ cottah or thereabouts were pointed out by eye-sketch. So far as the Nazir's proceedings go, the evidence seems to me to be against the defendants, but not so decidedly that I could deal with the case as one in which title was not in issue. Apart from the Nazir's proceedings, the evidence for plaintiff and the evidence for defendant are about even. The fact is that both the plaintiff and the defendants, especially the defendants, are to blame for having left the execution-proceedings in an indeterminate state.

I have framed the following issues in the case:—

1st.—Is this a case triable by a Small Cause Court?

2nd.—Has any notice (to quit) such as that spoken by plaintiff been issued by plaintiff and accepted by defendants?

3rd.—Has the defendant's 1½ cottah been demarcated (on the field) or not?

4th.—Had the Sale Ameen authority to ascertain and demarcate the 1½ cottah?

5th.—Is it true that defendants dwell on the land bought by plaintiff at auction, *i. e.*, on so much of the land as remained to defendants after the exclusion of the 1½ cottah.

It seems to me that the case is not one which can be tried in this Court; *1st*, because it is a question involving title; *2nd*, because it is a question relating to the decree of another tribunal, which, though superior to this Court, does not exercise supervision over this Court, and could not conveniently rectify any misinterpretation which I might happen to make as to that tribunal's proceedings.

The judgment of the High Court was delivered as follows by—

Jackson, J.—The Judge of the Small Cause Court in the present case has omitted to raise and try the really material issue which is whether, as alleged by the plaintiff the defendants agreed to pay him rent. If this be proved by the plaintiff, there is an end of the defence. If the plaintiff fails to prove it, it seems he cannot succeed in the present suit, for then the issue really would be whether the land belongs to him or to the defendants, and where the issue is of such a nature, the parties ought to have it settled in the Civil Court.

The 23rd March 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Consignee's Claim—Carrier's Liability.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Sealdah, dated the 20th September 1873.

Messrs F. Schlaepfer, Putz, & Co., *Plaintiffs*

versus

The Eastern Bengal Railway Company, *Defendants.*

The consignees of two bundles of cow hides which had been carried by a Railway Company having refused to take delivery on the ground of shortness in the number of pieces, the Railway Company pleaded that they were not indebted, as they had contracted to carry such and such a number of bundles, and had done so. The bills of lading showed so many bundles said to contain such a number of pieces. The Company also contested plaintiffs' enumeration of pieces:

HELD that the Railway Company was not liable, there being no evidence that the bundles had been broken, or the hides counted by pieces.

Case.—UNDER section 22 of Act XI. of 1865, I have the honor to solicit instructions of the Hon'ble Court on the following case.

Messrs. F. Schlaepfer, Putz, & Co. sue the Eastern Bengal Railway for Rs. 59-14, being value of two bundles of cow hides, part of two consignments carried by the Company, of which the plaintiffs had refused to take delivery as being short in number of pieces. The two bills of lading show 613 and 450 bundles of hides said to contain (at ten pieces each) 6,130 and 4,500 pieces only. The Railway Company plead not indebted on the ground that they contracted to carry such and such a number of bundles, and that they have done so. They also contest the correctness of the plaintiffs' enumeration of pieces.

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I fixed the following issues :—

1st.—Is the Eastern Bengal Railway liable on the enumeration of bundles only, or also on the enumeration of pieces?

2nd.—If the Eastern Bengal Railway is liable according to pieces, what was the number of pieces in this instance?

On the second issue, after careful examination, I have found that the plaintiffs' enumeration has been correct.

The first issue is the one on which I solicit guidance. The particular claim is small, but the question is an important one, for the Railway Company's business in hides amounts yearly to over two lakhs of pieces, exceeding six lakhs of rupees in value.

It appears that for the inland business hides are dealt with in tied and unassorted bundles of 10 each, whereas for sea-borne business they are assorted in Calcutta and screwed tight by powerful presses. There was nothing therefore to guide this Court in regard to practice with other carriers or consignees. The question is thus limited to the legal interpretation of the bills of lading. These are submitted herewith for the Hon'ble Court's inspection.

On this matter it has been urged against the Railway Company that their freight is charged by pieces and not by bundles, *viz.*, Rs. 25 per thousand pieces. The Railway Company reply that the enumeration of pieces is adopted merely for convenience of reckoning. (Some years ago it had been the practice to carry hides loose and to enumerate them thus.)

I think the Railway Company is bound by their freight reckoning, and ought to account for the hides by pieces and not merely by bundles, and consequently that they are liable for the present claim. In future they could protect themselves by altering the tariff mode of enumeration and therewith the terms of bills of lading.

The judgment of the High Court was delivered as follows by—

Jackson, J.—Under the facts stated by the Small Cause Court Judge, we think the Railway Company is not liable. There is no evidence that the bundles have been broken, or that the hides had been counted by pieces. The circumstance that the Company charges freight by the piece, and not by bundles, and accepts the enumeration showing that each bundle contains 10 pieces, is not, in our opinion, sufficient to fix the Company with liability to account for the hides by the piece.

The 23rd March 1874.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Law—Adoption after Payment of Price—Invalid Contract—Act IX. of 1872, s. 23.

Case No. 42 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 6th December 1872.

Eshan Kishore Acharjea Chowdhry and another (Plaintiffs), *Appellants,*

versus

Hurish Chunder Chowdhry and another (Defendants), *Respondents.*

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Appellants.

Mr. R. T. Allan and *Baboos Hem Chunder Banerjee* and *Kishen Dyal Roy* for Respondents.

The adoption of a son after payment of price is not recognized in the present (or Kali) Yuga; the only adoption now recognized being that of a *dattaka*, or son given.

A contract as to such an adoption could not be enforced, for it would come within the meaning of Act IX. of 1872, s. 23, as immoral and contrary to public policy.

Kemp, J.—The plaintiffs are the appellants in this case. The suit is brought for specific performance of a contract termed a nirbundo puttro. The plaint sets forth that the plaintiffs gave their son to be adopted by the defendant No. 1 in consideration of receiving an annual allowance during their lives of Rs. 900. They allege that the defendant No. 1 sent his gomashta Hurendro Narain Chowdhry to them to negotiate for the adoption of the plaintiff's son Binode Kishore Acharjea. Then that it was agreed that in consideration of the plaintiffs giving their son, the aforesaid annual allowance should be made to them. It is then said that

the draft of the agreement was partly drawn out, but that the defendant No. 1 being apprehensive that the adoption might be considered defective if any consideration was paid for the boy, it was agreed that the contract should be concluded after the ceremonies necessary to the said adoption according to Hindoo Law had been performed, and that the defendant No. 2 should be security for the money; and accordingly the defendant No. 2 gave the plaintiffs a roka on plain paper, agreeing that if he failed to procure from the defendant No. 1 an agreement for a monthly allowance to the above effect after the ceremonies of adoption were over he would be answerable. The plaint goes on to say that in reliance on the verbal promise of the defendant No. 2, the boy was given in adoption on the 10th of Pous 1278 and the ceremonies of adoption duly performed; but that notwithstanding repeated demands for the agreement and the money due under it, the defendants have hitherto put off the plaintiffs under various pretexts, and that neither has the nirbundo puttro been executed nor the amount been paid. The suit is therefore brought on a valuation of Rs. 9,500, or Rs. 9,000, being ten times the amount of the annual allowance, and Rs. 500 the amount of the said allowance for 6 months and 20 days from the 10th of Pous 1278, when the adoption was made, to date of suit, the 30th of Assar 1279.

The Subordinate Judge, Baboo Bidhoo Bhoosun Banerjee, has dismissed the plaintiffs' suit. He was of opinion that the plaintiffs well knew that the contract was an unfair and improper one, and one which they could not declare publicly until after the performance of the ceremonies necessary under the Hindoo Law to render the adoption valid. Then he says that the Hindoo Law clearly provides that in the present age, the Kali Yuga, the adoption of sons given from disinterested motives alone are valid, and that the system of purchase which obtained in former times is no longer in vogue in the present age, and cannot be considered valid. But irrespective of the restrictions of the Hindoo Law, the Subordinate Judge was further of opinion that such a contract was immoral and contrary to public policy as defined by section 23, Act IX. of 1872. He therefore dismissed the plaintiffs' suit.

The plaintiffs appeal against this decision, and Baboo Sreenath Doss who appears for them argues, *1st*, that there is no text of Hindoo Law prohibiting persons from entering into contracts of this description; and *2ndly*, that the Subordinate Judge was wrong in applying the provisions of Act IX. of 1872 to a case of this sort, as it was not against public policy for a Hindoo person to sell his son for the purposes of adoption.

We entirely concur in this case with the judgment of the Subordinate Judge. In former days, before the present Kali Yuga, there were twelve descriptions of sons, and the eighth description we find in the Hindoo Law was the son adopted after payment of price. Such an adoption, namely, after payment of price is not recognized in the present Yuga, the Kali Yuga, the only adoption now recognized being that of *dattaka* son, or son given, who alone can take the place of the *ourussa* son, or son of the loins.

The son given, that is, the *dattaka* son, is defined in the Dattaka Chandrika, section i, para. 12: "He is called a son given whom his father or mother affectionately gives as a son, being alike," alike being explained to mean of the same class. Now it could not be said, if this contract were carried out, that the boy has been affectionately given; a gift, of course, implies an act without consideration.

Then with reference to section 23 of Act IX., we think that the principle of that section is applicable to this case, as this contract if it were capable of being carried on and were recognized by the Court would involve an injury to the person and property of the adopted son, inasmuch as if it could be proved that the boy was purchased and not given, it is very probable that the adoption would be set aside, and if such adoption were set aside he would not only lose his status in the family of his adopting father, but also lose his right of inheritance to his natural parents, and such a contract would therefore involve an injury to the person and property of the adopted son; and again, such a contract, if permitted, would defeat the provisions of the Hindoo Law, and that is one of the restrictions laid down in section 23, Act IX. of 1872. In that section it is enacted that the consideration or object of an agreement is lawful, unless it is forbidden by law, or is of such a nature that "if permitted it would defeat the provisions of any law;" and it is very clear in this case that if the Court were to recognize a contract of this description, it would be defeating the provisions of the Hindoo Law. Therefore, concurring with the decision of the Subordinate Judge, we dismiss the appeal with costs. The defendant No. 2 will be entitled to separate costs.

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The 23rd March 1874.

Present :

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Hauts or Bazars—Farming Rents—Internal Duties—Reg. XXVII. of 1793.

Reference to the High Court by the Judge of the Small Cause Court at Jessore, dated the 13th November 1873.

Bungsho Dhur Biswas, *Plaintiff,*

versus

Mudhoo Mohuldar and another, *Defendants.*

There is nothing illegal in a contract, under a farming lease from the owner of a haut, to collect a portion of the proceeds of sale from persons exposing their goods for sale in the haut under temporary sheds or in open places, and such collections are not in the nature of internal duties, but of rent for the use of land.

The provisions of Regulation XXVII. of 1793 applied only to hauts or bazars existing at that time.

Case.—THIS is a suit in which the plaintiff claims rent of a portion of a haut (market) let in jumma to the defendants, and it is stated on the part of the plaintiff that under the tenure the defendants have to collect, from persons exposing their fishes for sale in the haut belonging to the plaintiff, under temporary sheds or in the open places near streets, one pice per rupee on the proceeds of sale of their goods and certain fishes, and no more; they have no other profit; that the sellers have no permanent shops or other buildings; and that the haut was erected in 1274 B. S.

It was enacted in section 5, Regulation XXVII. of 1793, that "the proprietary right "in the ground, on which hauts or bazars "are held, is to continue vested in the land-"holders, but the public are to have the free "use of it. The rules passed on the 28th "July 1790, extending to the abolition of "all collections heretofore made, under the "head of tebbazaree or other denominations, "from persons exposing their goods for sale "in the gunges, bazars, and hauts under "temporary stalls and sheds, or in the open "streets, and as the landholders are to receive "a compensation for these collections, they "can have no right, whilst such compensa-"tion is continued to them, either to appro-"priate the ground for the temporary use of "which such collections were made to any "other purpose, or to levy any exactions "whatever from the persons who may in future "expose their goods thereon for sale as here-"tofore; the ground on which hauts or bazars "are now held is accordingly to be continued "to be appropriated to this purpose, free of all "charge to the vendors. The above rule is "not to preclude the landholders from receiv-"ing the monthly or annual rent arising "from permanent shops or other buildings, "the collection of which is confirmed to "them by the rules of the 11th June 1790."

Regarding the compensations alluded to above, provisions were made in sections 6, 7, &c., of the said Regulation.

Under the above circumstances of the case and the rules and regulations, I am of opinion that this suit is not maintainable, because the collection of the rent sued for, namely, the duty on sale of goods, as stated above, is prohibited by law. The pleaders for the plaintiff contend that the said rules were applicable to the then existing hauts and bazars, regarding which compensation was awarded to the owners for the abolition of the duty, and not to those made thereafter. This contention appears to me to be without any effect.

Section 1 of the said Regulation says that "the imposition and collection of internal "duties have from time immemorial been "admitted to be the exclusive privilege of "Government, not exerciseable by any subject "without its express sanction, and conse-"quently it has ever been a well known law "of the country that no person can establish "a gunge, haut, or bazar without authority "from the governing power. Grants from "the sovereign, or his representative delegat-"ing this authority, as well as universal "tradition, prove that this right was asserted "by the Mahomedan Government, and the "orders of the Hon'ble Court of Directors, "as well as repeated declarations and pro-"mulgations by the British Administration, "demonstrate that this right was constantly

" asserted by the Company. It was, however, " judged advisable to leave the exercise of " this privilege to the landholders, Govern- " ment contenting themselves with imposing " general regulations for the prevention of " undue exactions, and occasionally interfer- " ing to modify or abolish particular imposts " as they occurred or were discovered. Ex- " perience having at length proved that pro- " hibitory orders for preventing oppression " were not attended with the desired effect, " it was determined, on the 11th June 1790, " to take from the landholders the power of " imposing or collecting duties altogether, " and to exercise this privilege immediately " and exclusively on the part of Govern- " ment. The consequences of this measure " were expected to be effectual abolition of " many vexatious duties on articles of internal " manufacture and consumption, as well as " on exports and imports; the suppression " of many petty monopolies and exclusive " privileges which had been secretly con- " tinued, to the great prejudice of the lower " orders of people; and as the natural effects " of the reform of these abuses, benefit to trade " and ease to the inhabitants of the country in " general. A further consequence expected " from the exercise of the privilege was a " future opportunity of augmenting the public " revenue, in case the exigencies of Govern- " ment should render it indispensably neces- " sary, without increasing the assessment on " the land. But this was a secondary expect- " ation only; the primary objects intended " were those first stated, the promotion of " commerce and general relief of the inhabit- " ants, &c." " The principles on which it " was determined that a compensation should " be made to the parties affected by the " discontinuance of the privilege of collecting " duties were as follow: *Firstly*, it having " never been lawful to exercise this privilege " without the sanction of Government, it " followed, of course, that all instances of the " exercise of it without such sanction were " illegal usurpations, and the usurpers, so " far from having any just claim to a com- " pensation, might, without injustice, have " been made answerable for the amount " unlawfully received by them. As, however, " the Company had limited their retrospec- " tion, in similar cases, to the period of their " accession to the Dewanny, this principle " was adopted only with regard to collections " commenced since that period; *secondly*, " Government having also always reserved to " itself a power of abolishing all duties " deemed oppressive, it followed that all " collections made contrary to any prohibitory " orders of Government were unauthorized " exactions, for which no compensation was " due to the parties who had benefited by them; " *thirdly*, the condition of particular persons " reduced to distress by the deprivation of " the income they have received from duties " though *unauthorized*, being a separate con- " sideration, unconnected with the question of " *right*, was reserved for determination in " cases might occur; *fourthly*, the holders " of lakhiraj land who had received the " sanction of Government to the establishment " of gunges, bazars, and hauts on their " lands, or, in other words, who had been " authorized to exercise the privilege of " collecting duties thereon, were deemed " entitled to a full compensation for the " resumption of such privilege, adequate to " the annual profit they derived from it; " *fifthly*, the holders of malgoozaree lands " who had been permitted to collect gunge " haut, bazar, or other duties on their lands " were also considered entitled to a full " compensation for the profit they were " allowed to enjoy from such collections; and " these profits having, by a general regulation, " been limited to one-tenth of their real " receipts, an equivalent to this proportion " was considered the compensation due to " them, &c."

Section 2 enacts that "no landholders, " or other person of whatever description, " shall be allowed to collect in future any tax " or duty of any denomination; but all " taxes and duties shall be hereafter levied, " on the part of Government, by officers " duly appointed for that purpose under such " Regulations as may be passed for their " guidance."

Again section 4 says that "the privilege " of imposing and collecting internal duties " has been resumed from the landholders, and " taken exclusively into the hands of Govern- " ment for the purpose of reforming abuses " in these collections, and thereby affording " benefit to the commerce of the country, as " well as general ease to its inhabitants."

Referring to the above rules and regulations, it is quite evident that the rules are applicable to all the hauts and bazars established before or after the promulgation of those rules and regulations, and the landholders have no right whatever to collect the duties aforesaid. When the duties were once considered to be vexatious duties and prejudicial to the people, in 1793, how is it possible that the same vexatious duties were allowed to

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rting to the recent Government Resolu-
in the Revenue Department, dated 30th
last, I think that they are not obsolete
s to render a civil suit to obtain the
maintainable.

a. 3rd of the said Resolution provides
"the system of illegal exactions is
, however, in such universal vogue, is
eeply rooted, and so many social relations
end thereon, that it becomes a question
ther it is desirable that Government
ld, by any general or very stringent
sures, interfere to put a stop to them.
must be thoroughly understood, however,
t the Government, in hesitating to adopt
re or extreme measures, in no degree
gnizes or legalizes these cesses. Illegal,
coverable by law, and prohibited by law
must remain; but it may perhaps be
ter, under all the circumstances, except
extreme cases, not directly to interfere,
."

is therefore apparent that a suit for the
which is prohibited by law cannot be
tained in a Court of law. The plaintiff
uces a written contract executed by the
ndants, but, when the consideration of
ontract is unlawful, it is void under the
tract Act.

ction 24 of Act IX. of 1872 provides
"if any part of a single consideration
one or more objects or any one or
"any part of any one of several considera-
"tions for a single object is unlawful, the
"agreement is void."

When, under the current law, the agreement is void, it cannot be enforced. The pleaders pointed out some precedents noted in the margin. I believe that the sections 1, 2, and 4 mentioned above were not pleaded, and were not taken into consideration. But, as they request me to refer the case for the decision of the Hon'ble High Court, and as the subject is an important one respecting some classes of people, I think it my duty to submit to the Hon'ble Court, for their decision, the following question:—

Chunder Nath Roy *vs.* Moonshee Jummadar, W. R., Vol. XVI., p. 268.
Moonshee Aftabooddeen Ahmed *vs.* Mohinee Mohun Doss, W. R., Vol XV., p. 48.
Roy Boikointa Nath Roy Chowdhry *vs.* Baboo Ram Ruttun Roy, dated 25th May 1853, S. D A. Decision.

Whether a suit for rent of an ijara let to the defendants who have thereon to collect a portion of the proceeds of sale from persons exposing their goods for sale in the haut belonging to the plaintiff, under temporary sheds or in the open streets and open places, is maintainable in a Court when the claim is supported by a written contract.

The judgment of the High Court was delivered as follows by—

Jackson, J.—We think there is nothing illegal in the contract which the plaintiff seeks to enforce. It has been repeatedly held by various Division Courts that the provisions of section 5, Regulation XXVII. of 1793, applied only to hauts or bazars existing at that time. The haut now in question is of quite recent formation, *viz.*, it appears to have formed in 1274. The collections which the plaintiff let in farm to the defendants are not, it seems to us, in the nature of internal duties. They are merely in the nature of rent which the owner of the land receives from persons who go to sell goods on his land in the shape of a part of the proceeds of sale, instead of a fixed monthly or yearly payment. Nothing obliges a dealer to resort to the spot, and, if he chooses to enter into a contract with the landowner that he is to pay him so much per month or per year as rent for the use that he makes of the land, we see nothing in the law to prevent him from doing so; and, as the defendants took a farm of these rents which had been previously levied by the plaintiff himself, we think the plaintiff is bound to act up to his contract. It does not indeed appear, as far as we can see, that this question was raised by the defendants themselves.

The 23rd March 1874.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Permanent and transferable Interests—Nature of Enjoyment—Character of Grant.

Case No. 1519 of 1873.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 3rd April 1873, affirming a decision of the Sudder Moonsiff of that District, dated the 31st December 1872.

Nidhee Kristo Bose (Plaintiff), *Appellant,*

versus

Nistarinee Dossee and others (Defendants), *Respondents.*

Baboos Hem Chunder Banerjee and *Bama Churn Banerjee* for Appellant.

Baboos Kalee Mohun Doss and *Saroda Churn Mitter* for Respondents.

Applying the maxim of *optimus interpres rerum usus*, it may be shown by evidence as to the nature of the enjoyment of any immoveable property what the grant in its origin really was. Accordingly, the frequent transfer of an interest in a tank without any change in the terms of the holding or in the amount of rent paid, extending over more than 60 years, was held to prove that the interest was a permanent and transferable one, which could be maintained against the proprietor of the talook in which the tank was situate.

Markby, J.—THIS case has been very fully argued, but I cannot help thinking that there is some misconception as to the point which we have to determine.

It appears that the plaintiff is the purchaser of a talook which was sold by the zemindar under the provisions of Regulation VIII. of 1819 on account of arrears of rent due from the talookdar. The plaintiff sues for possession of a tank which the defendant Nistarinee, who is now in possession, holds by purchase of the interest of one Golam Sufdar. Golam Sufdar purchased the tank in 1257 from the heirs of Gopee Nath Paulit, who had himself purchased it in 1213 from one Kristo Mohun Hajra.

The question for determination is whether the interest in the tank which has thus passed to the defendant Nistarinee is a permanent and transferable one which she can hold against the plaintiff, who is the proprietor of the talook in which the tank is situate.

The facts as found by the Courts below are that the talook has been held upon payment of an unvarying rent of Sic. Rs. 2-8 for a very long period, certainly ever since 1213, and long before the grant of the talook which the plaintiff now holds. I also think it has been rightly presumed that the tank has been so held for a considerably longer period, in all probability prior to the permanent settlement.

There is no evidence on either side as to the creation of the interest in the tank which is now held by Nistarinee, nor has any written document been produced relating thereto.

It appears, however, that Golam Sufdar who purchased the interest of the Paulits in the tank, was with his brothers, the owners of the talook also, and the Moonsiff considers that this leads to the inference that the holder of the tank had an interest which could not be extinguished at the will of the zemindar or of the talookdar who represented him.

In the first Court the case was evidently treated as governed by Act VIII. (B.C.) of 1869, but, as the property in dispute is a tank, it is now admitted that the second Court was right in holding that that statute is not applicable. Nevertheless the second Court dismissed the suit to recover possession, holding upon the evidence that the defendant was possessed of a permanent transferable interest in the tank.

I think the point for our consideration is whether, upon this evidence, the Courts below were at liberty to come to the conclusion that the defendant was possessed of such an interest.

In my opinion the Courts below were at liberty to draw this conclusion. I do not for a moment intend to say that, by occupation upon a holding which was originally terminable at will, a permanent interest can be gained, except there be some special circumstances which show that the terminable holding has been subsequently converted by agreement into an interminable one. I have held the contrary, and I still adhere to that opinion. Of course I mean apart from the special provisions of Act X. of 1859 as to rights of occupancy and as to tenures which existed prior to the permanent settlement, which provisions do not apply to this case. But, upon a principle in some respects analogous to that expressed in Act X. of 1859, but which existed before that Act was passed, which still exists independently of that Act, and which is applicable to all immoveable property alike, whether lands, houses, tanks, or gardens, it may be shown

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d to this case is that the parties stand
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use of these words as applied to the
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s holding tenures under them in this
y, but poverty of language sometimes
ls us to resort to them; and I fully
that here as elsewhere a tenant (by
I mean any person holding land
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er) stands in a very different position
a person who holds land as his own, or
s commonly said, who holds it *adversely*.
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in respect of the land which he holds
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13, per Holroyd, J.). It is not necessary
case to go to that length; nor do I
at the circumstances of this case would
us in going to that length. But I
to the case as a strong illustration of
pplication of the principle under consi-
on to the rights of two persons, one of
paid, and the other was in receipt
t. The case has been followed in Reynolds *vs.* Reynolds, 12 Irish Equity Reports 172.

I do not think that any of the cases cited by Baboo Hem Chunder Banerjee conflict with this view. Certainly the case reported in the XII. Weekly Reporter 404, does not do so: and as far as I can see, the case in XVII. Weekly Reporter 383, was of a similar description. There the tenure was of modern creation, and there was no evidence beyond the bare payment of rent.

The Court below seems to think that the rent might be enhanced. Upon that point we express no opinion. We simply dismiss the appeal and affirm the decree of the Court below which dismisses the suit. The respondent is entitled to his costs.

Birch, J.—The plaintiff as purchaser at a putnee sale for arrears of rent sued to obtain khas possession of a tank held by the defendant at a rent of Rs. 2-8 sicca. The plaint was not clearly drawn, but the issues framed admit of the contention raised before the Lower Appellate Court and before this Court. The Moonsiff dealt with the case as though the plaintiff had relied solely on his rights as auction-purchaser under Regulation VIII. of 1819, and held that the plaintiff could not eject the defendant from the tank. Before the Judge in appeal objection was taken to this finding, but a further argument was raised that even if the plaintiff failed to establish the right he set up as auction-purchaser at a sale under Regulation VIII. of 1819 he was entitled to succeed in his suit by virtue of his position as landlord, the defendant having admitted that he held a rent-paying tenure in the shape of a tank within the limits of the plaintiff's putnee for which he paid rent to the putneedar. The Judge held that the plaintiff had failed to prove that the defendant's tenure was created by the defaulting putneedar; that he had failed to establish the collusion he alleged between the defendant and the defaulting putneedar; and he further held that the tank was portion of an old holding paying a jumma of Rs. 7-12 and not a separate holding by itself. He was of opinion that the defendant had by possession for 60 years acquired a title, and he confirmed the Moonsiff's order dismissing the suit.

In special appeal the argument that the plaintiff has acquired any right to eject the defendant by virtue of his purchase at a sale under Regulation VIII. of 1819 may be said to have been abandoned.

It is urged that the Judge is wrong in saying that this tank ever formed part of a

ryot's holding; that there is no evidence to support this. Upon this point I think we must hold that there is not sufficient evidence to satisfy us that the tank was part of any holding. The argument most pressed upon us is that the defendant being admittedly a rent-paying tenant cannot by any length of possession acquire a title against his landlord; that his occupancy not being protected by statute or contract could be determined by his landlord at pleasure; and that the plaintiff was therefore entitled to take khas possession of this tank.

In a recent decision of this Court it has been held (Volume XIX. Weekly Reporter, p. 200) that the provisions of Act X. of 1859 are not applicable to tanks which are not appurtenant to any ryotee holding, but held separate. The Rent Law therefore not being applicable to a tenure of this nature, we have to consider whether the defendant is protected from ejectment by the common law of the country. It has frequently been held by the Courts in this country that a tenant cannot plead limitation against his landlord; possession for 60 years gives a tenant no title to his tenure as against his zemindar, so as to convert his tenant right into a right of ownership. Long possession may protect his tenancy, but it cannot as a matter of law be said in this country to create a title to the land so held.

We have only to consider in this case whether the arbitrary right to eject can be enforced.

This tank is proved to have been in existence so far back as 1213 B. S. (1807 A. D.), or within 14 years of the permanent settlement. It was then sold by Kristo Mohun Hazra to Gopeenath Paulit, and passed from him to the former talookdar, who again sold it to the present defendant. Possession at an uniform rent is thus traced back for 66 years. When the putnee was first created does not appear, but it must have been subsequent to the year 1807. It is well known that it was customary for zemindars to grant lands at a quit-rent for the purpose of digging tanks or for gardens, and reference is made in section 8, Regulation XLIV. of 1793, to such leases. They were excepted from the prohibition then in force against the granting of leases by zemindars for a period exceeding ten years. And the ground for exemption seems to have been that such leases were not improvident diminution of the culturable area of the estate, but were calculated to benefit the property. No one would be likely to go to the expense of digging a tank unless he secured a tra[n]sferable interest therein. In the case be[fore] us, it is true that no grant is produced, [but] when it is established that this tank was [in] existence so far back as 1807, was [it] transferred by its possessor to Gopee[nath] Paulit, and after passing from father to [son] in that family was transferred again by [sale], the rent all along remaining the same, [we] think we may fairly presume that it originat[ed] in a grant, and has always been treated as [a] transferable tenure.

That it was so treated by the plaintiff's predecessor is pointed out by the Moonsiff in his judgment. The purchase of the tank by one of the former talookdars gives the plaintiff no right to determine the tenure. Rent has all along been paid for the tank. The defendant by purchase acquired only the right to hold the tank on the same terms as his vendor, *i.e.*, by payment of rent. To allow the plaintiff arbitrarily to eject the defendant from this tank would be inequitable and unjust. Both the lower Courts, though for different reasons, have concurred in dismissing the plaintiff's suit, and I think that the special appeal must be dismissed with costs.

The 23rd March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Mo[ore], *Judges.*

Possession—Title—Limitation—Reversioner—Cause of Action.

Case No. 280 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 12th December 18[73], reversing a decision of the Sudder Moonsiff of Mozufferpore, dated the 26th June 1872.

Mussamut Ram Luchmee Kooer and another (Defendants), *Appellants,*

versus

Kashee Pershad Sahee and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboo Chunder Madhub Ghose* for Appellants.

Moonshee Mahomed Yusoof for Respondents.

In a suit to recover possession of, and a declaration of title as heirs to, land alleged to have belonged to our

to have been given by him before his death in l shares to his daughter-in-law G and grand-hter-in-law L, to be enjoyed by each respective-ring life by way of maintenance:

LD that, if plaintiffs' case was made out, their e of action, in respect of the moiety given to G, on the death of G, and that, in respect to the y given to L, so far as plaintiffs had a right to a ration of title, their cause of action arose when L d the substitution in the Collector's books of her hter's name in place of her own.

rder passed on the 24th February 1874.

Phear, J.—In this suit the plaintiffs seek cover certain land from two ladies, Ram hmee Kooer and Ablakee Kooer.

heir case is that this land belonged to Deryah Sahoy, who died in the year 1257, ing no son or male issue or daughter; that, before he died, he gave one moiety his land to his daughter-in-law Mussamut ga Kooer, and another moiety of the land his granddaughter-in-law Mussamut Ram hmee Kooer, to be enjoyed by each of e ladies respectively for the term of her y way of maintenance.

he plaintiffs further say that Mussamut ga Kooer died in 1267; that Mussamut Luchmee Kooer has caused the name of daughter Ablakee Kooer to be substituted he Collector's books in the place of her name in respect of this property; and ging that they are the heirs of Deryah oy, they, on this ground, seek to recover ession of this property and a declaration eir right and title to it.

he Moonsiff held that the suit was ed, being of opinion that the plaintiffs' e of action arose upon the death of yah Sahoy, whose heirs they represent mselves to be. But the Judge has rruled this decision, expressing his opinion ollows: "I opine that, as Deryah Sahoy ly made over the property to them" s is, Mussamut Gunga Kooer and Mus-ut Luchmee Kooer) "in equal shares r their maintenance" (a fact to be inferred m a statement of the surviving widow m Luchmee Kooer), "that the cause of ction accrues, not from Deryah Sahoy's eath, but from the demise of Gunga Kooer, also from the date on which the surviving idow attempted to alienate the property y the insertion of her daughter's name in he Collector's rent-roll to the detriment f the blood relatives" (plaintiffs in this e). "The widow's possession was merely ermissive, 'not adverse to the plaintiffs' ossession. This fact is perfectly clear. consider that the plaintiffs were right, "and that they acted with honourable "consideration in not attempting to disturb "the widow's permissive possession."

We do not clearly understand the meaning of the latter passage in this quotation. But we think the Judge is at any rate correct in holding that the ground of limitation upon which the Moonsiff decided the case did not exist. If the plaintiffs' case is made out, then, no doubt, so far as regards the moiety of the property which was given by the previous owner to Mussamut Gunga Kooer for her maintenance, they were not entitled to obtain possession of it until that lady died in 1267; and that date was not twelve years before the suit. And so far as regards the other moiety the plaint made out no title to possession at all; though possibly the facts stated there might be sufficient to give the plaintiffs a right to have a declaration of title. And so far as the plaintiffs had a cause of action of this kind, it first arose to them when Mussamut Ram Luchmee Kooer caused her daughter's name to be substituted in the Collector's books Thus it seems to be pretty clear that the suit was not, in respect of either cause of action, barred on the ground that the cause of action accrued more than twelve years before the institution of suit. No objection was made to it on the ground of multifariousness.

The defendants, however, set up another ground of limitation: They say that the plaintiff had, on a former occasion, brought a suit to recover possession of the same land, and that that suit had been dismissed on the ground that it was barred by limitation. It seems that this is so. But, so far as the plaint in that suit has been brought under our notice, we think that the cause of action there alleged and relied upon was entirely different from the present cause of action. It appears that in that suit the plaintiffs sought to recover this property on the allegation that it belonged to them at that time; that it had become their property immediately upon the death of Deryah Sahoy; and that they had been wrongfully evicted from it, or wrongfully kept out of it by these widows, excepting so far as an ekrar had for a time been operative between them, the terms of which ekrar had been violated by the widows, and that the plaintiffs' right to immediate possession had revived. If this were, in substance, as we take it to be, the cause of action in that suit, then it was manifestly quite different from the cause of action in this suit, and the present suit is not

barred by the operation of section 2, Act VIII of 1859.

Although the suit thus appears not to be barred by any law of limitation, we are not sure that the case ought to be remanded generally for trial on its merits. The suit of the plaintiffs depends primarily upon two allegations: *First*, that the ancestor of the defendants, Deryah Sahoy, gave to Mussamut Gunga Kooer a moiety of this property to be held by her by way of maintenance during her lifetime; and, *second*, an allegation to the same effect with regard to Ram Luchmee Kooer, and the burden of proving these allegations evidently lies upon the plaintiff, for, if he fails to establish them, his suit is unquestionably brought out of time. But with regard to the proof of these allegations, we have had it brought to our notice that the plaintiff petitioned the first Court before trial to the effect that he did not wish any witnesses to be summoned, but wanted time in order to put in three documents which he mentioned as documents important for the proof of his case. We are not at present satisfied as to whether, having regard to the nature of this petition and the documents which have been filed in accordance therewith, it will be necessary to send back the case for further trial. We will, therefore, take time to consider that point. In the meanwhile, we will, for the better consideration of them, have the petition translated as well as each of the documents We will give our final opinion on this point as soon as we conveniently can.

Final Order.

Phear, J.—We have already given our reasons in this case for agreeing with the Judge in thinking that the suit is not barred by limitation, but we took time to consider whether or not it would be necessary to remand the case to the first Court for re-trial.

We are now of opinion that it is not necessary to do so.

The plaintiff expressly stated to the Court of first instance that he did not desire to have any witnesses summoned, and that he only required three documents to be filed on which he intended to place his case; and we think there is no doubt that the plaintiff had no ground on which he could base his suit other than the evidence afforded by those three documents.

It is not suggested to us on special appeal that any other ground exists, although it has been argued that the statement made by the plaintiff that he did not require summonses for witnesses ought not to have the effect of binding him not to offer any oral evidence at the trial.

If it could be shown to us in what way oral testimony could have been used by the plaintiff for his case, and what the oral testimony was which he had ready for the purpose we might have given him the opportunity of going to the first Court for trial. But, as already said, the plaintiff placed his case solely on three documents. These documents have been translated, and we have given them our best attention. Only one of them is of primary importance, and that is the document in which the deceased Deryah Sahoy, before his death in 1257, petitioned the Collector asking that the name of his daughter-in-law Khagon Kooer, and granddaughter-in-law Luchmee Kooer, should be placed in the Collectorate books, instead of his own, as owners of his zemindary, because they were his sole heirs and representatives.

This is very strong evidence, indeed, to show that Deryah Sahoy gave this property to these ladies to hold absolutely of their own right; and the other two documents do not serve, in our opinion, to rebut this evidence. Indeed, they only apply to one moiety of the property. They purport to be written statements made by the granddaughter-in-law to whom one moiety had been given, and by her daughter, the two defendants before the Court, in a suit brought against them by Ranee Kooer, the daughter of Mussamut Khagon Kooer. At the utmost these written statements describe the motive from which their ancestor, Deryah Sahoy, had given his share of the property to his daughter-in-law Khagon Kooer. We do not think they amount to substantial evidence which should have the effect of cutting down and rebutting the evidence of the gift which, we think, is afforded by the first document to which we have referred. This being so, we think we ought not to send back the case to the first Court for further trial. It appears to us that the plaintiff's suit fails on his own materials, and ought to be dismissed.

We think it not out of place to remark that this is the second time that the plaintiff has brought a suit to recover this property, and the right on which he founded his suit to recover varies most materially each time.

The order of the Lower Appellate Court will be reversed, and the plaintiff's suit dismissed. The defendant is to have his costs in all the Courts.

The 23rd March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Limitation—Act IX. of 1871, Sch. II., art. 167—Order for Costs on Appeal.

Cases Nos. 347 and 348 of 1873.

Miscellaneous Appeals from an order passed by the Officiating Judge of Shahabad, dated the 17th June 1873.

Hurbuns Lall and another (Decree-holders), *Appellants,*

versus

Sheo Narain Singh (Judgment-debtor), *Respondent.*

Baboo Boodh Sen Singh for Appellants.

Baboo Tarucknath Pallit for Respondent.

An order for costs made by the High Court on appeal comes within the scope of the Limitation Act of 1871, Sch. II., art. 167.

Phear, J.—In this case the Judge was of opinion that the decree or order which the applicant sought to enforce fell within article 166 of the 2nd Schedule to the Limitation Act of 1871. That article is in these words: "For the execution of a decision (other than "a decree or order passed in a regular suit "or an appeal) of a Civil Court or of a "Revenue Court," the period of limitation is one year. But it seems to us that the decree or order in the present case falls within the exception of the article, because it is an order for the payment of costs made between the parties by this Court on appeal from the order of the lower Court, and that being so, it must come within the scope of the more general article 167 "for the execution of a decree or order of any Civil Court not provided for by No. 169." No. 169 provides for the enforcing "a judgment, decree, or order of any Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction."

This was an order of this Court, but was made on appeal, and not in the exercise of Original Civil Jurisdiction. But if it falls under article 167, the period of three years is prescribed, and the applicant is not barred. The same period is provided by the old Limitation Act, and it is therefore immaterial to consider whether the old or the new Limitation Law applies, because, in either case, the applicant would have three years.

We accordingly reverse the order of the lower Court, and remand the case to that Court in order that the execution-proceedings may be duly carried out. The appellant must have his costs of these appeals, which we assess at one gold mohur in each case.

The 24th March 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Act VI. (B. C.) of 1868, Sch. K, cl. 1—Magistrate's Conservancy Powers—Act XVIII. of 1850.

Case No. 1 of 1874.

*Appeal under section 15 of the Letters Patent against the decree of the Hon'ble W. Markby and E. G. Birch, two of the Judges of this Court, made on the 22nd of December 1873, in Special Appeal No. 1550 of 1872, the said Judges having been equally divided in opinion.**

Baboo Chunder Narain Singh, Deputy Magistrate of Cutwa (Defendant), *Appellant,*

versus

Brojo Bullub Gooie (Plaintiff), *Respondent.*

Baboo Annoda Pershad Banerjee for Appellant.

Baboos Mohinee Mohun Roy and *Umbica Churn Banerjee* for Respondent.

The removal of an obstruction by a Magistrate, in exercise of the powers given to him by Act VI. (B.C.) of 1868, Sch. K, cl. 1, is not a judicial but an executive or ministerial act; and even the circumstance that a fine

* 21 W. R. 26.

is imposed on the person who set up the obstruction does not protect the Magistrate, under Act XVIII. of 1850, from an action being brought to try the question of such person's right to have the obstruction there.

BABOO ANNODA PERSHAD BANERJEE, for the appellant, contended that the appellant, being armed with the powers of a Magistrate, acted judicially in directing the removal of the obstruction under Schedule K of Act VI. (B.C.) of 1868. Clause 1 of Schedule K says: "Whoever builds any wall, or erects or sets "up any fence, rail, post, or other obstruction "or encroachment in any public highway, or "in or over any open drain, sewer, or aque- "duct along the side of any such highway, "shall be liable to a fine not exceeding fifty "rupees; and the Magistrate shall have "power to remove any such obstruction or "encroachment; and the expense of such "removal shall be paid by the person erect- "ing the same, and shall be recoverable from "him in the manner provided in section "83 of this Act."

In the present case information was given to the Magistrate by a municipal constable that one of the residents of the town had constructed some steps over the open drain alongside of the highway. Upon receiving this information the Magistrate proceeded to make a judicial inquiry, and the result of that inquiry was that he fined the accused Rs. 20 for obstructing the highway, and ordered the steps to be removed under the powers vested in him by Schedule K. Under the circumstances, therefore, he acted judicially. He summoned the person accused of creating an obstruction; he heard evidence for and against him; he came to a decision thereon; and he directed the removal of the obstruction. All these were judicial acts, and he ought, in consequence, to be protected from a civil action. It is true he was also Chairman of the Town Committee, but that does not affect the present case, for the power which he exercised in causing the removal of the obstruction he exercised as Magistrate, and not as Chairman of the Town Committee.

Again, it cannot be supposed that the appellant, in this case, acted in any way other than in good faith and in the firm belief that he had perfect jurisdiction to deal with the matter as he had done. Having, therefore, had this belief, and having acted in a *bonâ-fide* manner, he is protected from a civil suit, for Act XVIII. of 1850 provides that "no Judge, Magistrate, Justice of the "Peace, Collector, or other person acting "judicially, shall be liable to be sued in any "Civil Court for any act done, or ordered to "be done, by him in the discharge of h "judicial duty, whether or not within t "limits of his jurisdiction: Provided t "he at the time in good faith believed h "self to have jurisdiction to do or order t "act complained of."

In the case of Ujjulmoyee Dossee Chunder Coomar Neogee, 12 W. R. (F. B.) it was held that no suit will lie to set aside order made by a Magistrate under Chap XX. of the Criminal Procedure Code, or to strain him from giving effect to his order. Se tion 311 was held to bar the jurisdiction of Civil Court in such a case. *Vide* also the ca of Madhub Chunder Gooho *vs.* Kamlak Chuckerbutty, 15 W. R. (Civil) 293, and t case of Toger *vs.* Child, 7 E. & B. 377.

The act of removing or causing the remo al of the obstruction, in the present ca was clearly the legal consequence of t conviction of the accused by the Magistrat

Baboo Mohinee Mohun Roy, for th respondent, contended that the appella acted extra-judicially in causing the remov of the obstruction in the present case.

No doubt some of the powers and duti confided to the Magistrate under Schedul K of Act VI. (B.C.) of 1868 are judici but the others are clearly not. In order t ascertain what powers are judicial and wh powers are not judicial, it is necessary t read Schedule K with sections 82, 83 and 42 of the Act itself, and then it will be found that Schedule K is primarily a Schedule of conservancy powers, though it is true that other powers are contained in it. Section 42, however, clearly appears to draw the line between the judicial and conservancy powers. It provides that "it shall be compe- "tent to the Government to declare that all "or any of the powers and authorities which "are vested in the Magistrate, and the duties "which are imposed upon him by the sections "enumerated in Schedule B to this Act "annexed, or by any of them, shall be vested "and exercised by the Town Committee at "a meeting." Amongst the duties which are enumerated in Schedule B as being capable of being so transferred, are clauses 1 to 13 of Schedule K, which includes, there- fore, that which has been exercised in the present case. But section 42 goes on to pro- vide that "nothing herein contained shall be "deemed to confer upon any Town Com- "mittee any power to impose a fine." There- fore it follows that, so far as the fining of the accused by the Magistrate is concerned, it was a judicial act; but, inasmuch as

using the removal of the steps was exercised by a power not conferred upon the Magistrate, but upon the Town Committee, by reason of its being a conservancy power, cannot be said that the appellant, having, in his magisterial capacity, caused the removal of the steps, acted judicially and in discharge of his judicial duty. It has been asserted by Baboo Annoda Pershad Banerjee that, if a Magistrate acts *bond fide* and conscientiously believes that he had jurisdiction to do a certain act, although his belief may be erroneous, he is yet protected from a civil action being brought against him for damages or for compensation. Act XVIII. of 1850 is quoted in support of his assertion, but Baboo Annoda Pershad Banerjee forgets that the appellant, in the present case, in causing the removal of the steps, did not act as Chairman of the Town Committee, but in his capacity of Magistrate, and therefore Act XVIII. of 1850 does not apply, because he was not acting judicially; nor do the cases cited—Madhub Chunder Shoho *vs.* Kamlakant Chuckerbutty, 15 W. R. (Civil) 293, and Ujjulmoyee Dossee *vs.* Chunder Coomar Neogee, 12 W. R. (F. B.) 18—apply to the present case; for it is clear that in both those cases the Magistrate acted judicially in bringing the suits under Chapter XX. of the Old Criminal Procedure Code. If in this case the appellant had proceeded against the accused under section 521 of the new Criminal Procedure Code, he would then clearly have acted judicially, and no suit could have been brought against him. He did not, however, do this, but proceeded to take evidence in the case without previously swearing the witnesses, then convicted the accused, fined him, and finally caused the removal of the obstruction; which last, under the circumstances, he had no power to do by section 42 of Act VI. (B. C.) of 1868.

The Appellate Bench delivered the following judgments:—

Couch, C.J.—In this case, which was an appeal from the judgment of Mr. Justice Markby as the senior Judge sitting with Mr. Justice Birch, the first ground of appeal is that the Magistrate, in his proceeding under Schedule K of Act VI. (B.C.) of 1868, acts judicially and in discharge of his judicial duty in directing the removal of the obstruction which was removed by him, and for the removal of which the plaintiff brought the suit against him and another person, and that, therefore, Act XVIII. of 1850 is a bar to a suit against the Magistrate. The second ground is more general, being that Mr. Justice Markby ought not to have held that the powers and duties mentioned in Schedule K, with the exception of the powers to punish an offence, are not judicial.

Act XVIII. of 1850 provided that no Judge or Magistrate, &c., or other person acting judicially, shall be liable to be sued in any Court for any act done, or ordered to be done, by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction; provided that he in good faith believed himself to have jurisdiction to do or order the act complained of. The object of that Act was not to introduce the rule that a Magistrate acting judicially was not liable to a suit, but the further rule that he was not liable although the act was not within the limits of his jurisdiction, if he *bond fide* believed it to be.

The question in this case is whether the removal of the obstruction by the Magistrate, in exercise of the powers given to him by the first clause of Schedule K, is a judicial act.

The clause is whoever builds any wall, or erects or sets up any fence, rail, post, or other obstruction or encroachment in any public highway, or in or over any open drain, sewer, or aqueduct along the side of any such highway, shall be liable to a fine not exceeding Rs. 50; and the Magistrate shall have power to remove any such obstruction or encroachment; and the expense of such removal shall be paid by the person erecting the same, and shall be recoverable from him in the manner provided in section 83 of this Act.

If the whole of this clause is to be read as one single provision, and the power of the Magistrate to remove an obstruction only exists where the person building or setting up the obstruction has been convicted and punished by a fine, it might be said that the conviction of setting up the obstruction and imposition of the fine and the removal of the obstruction being one act, and the order by the Magistrate that it should be removed being part of the judicial proceeding for punishing the offender, the whole was a judicial act; that the removing the obstruction could not be separated from the awarding of the punishment of the fine. But it appears to me that this would not be a reasonable construction of the clause; for, then, it would not provide for the cases where it may be necessary, for purposes of conservancy, that the obstruction should be removed, and yet no person can be discovered who could be punished for setting it up and made liable to pay a fine, or from whom even the

expense of the removal could be recovered. This clause, although it contains two provisions, one for the punishment of the author of the obstruction, and the other for the removal of the obstruction, must be looked at as if it was in fact two clauses, one providing for the judicial act of determining who the offender is and punishing him, and the other for what may be done separately and without any offender being punished, namely, the act of removing the obstruction, which may properly be called an executive or ministerial act.

In other parts of the Schedule also, we find clauses some of which relate to judicial acts, namely, powers of fining for offences. For instance, there is the 3rd clause, where, if a person, being ordered to remove a projection, encroachment, or obstruction, does not do so, he shall be liable to a fine not exceeding Rs. 50, and the Magistrate in such a case may remove or alter the projection, encroachment, or obstruction. Others are, clause 8, where, if a person neglects or refuses, after notice from the Magistrate, to keep a drain, privy, or cess-pool in a proper state, he shall be liable to a fine; and the 9th clause, where the fouling of water by bathing, washing, throwing rubbish, &c., is made punishable by a fine. Then there are powers which are not judicial, as in the 10th clause, which gives to the Magistrate the power of filling up unwholesome tanks in private premises, and provides in the same way as the first clause that the expense incurred thereby shall be paid by the occupier of such premises, and shall be recoverable from him in the manner provided in section 83 of the Act; and the 11th, which gives the Magistrate power to clear noxious vegetation, and improve bad drainage; and the 12th, which gives him power to drain off and cleanse stagnant pools in open places; and the 13th, which gives him power to cause places near public highways, which are dangerous to passengers, to be repaired, protected, and enclosed.

Here are various acts which may be done by a Magistrate by virtue of this Schedule which are not judicial. They are ministerial acts, and acts which may, in some cases, be done by virtue of the Act by persons who are not Magistrates, namely, the Town Committee. They, in no way, partake of the nature of a judicial proceeding.

It seems to me that the Schedule to the Act gives power to the Magistrate, for purposes of conservancy, to do things which are merely ministerial. It also gives him power in certain cases to punish an offender by a fine. But these are distinct acts, and the circumstance that in this instance there has been the imposition of a fine upon the person who is said to have set up the obstruction does not make the act of the Magistrate which followed it, the act of removing the obstruction, in any way a judicial act. It does not protect him from an action being brought, not to try the legality of his decision in punishing the offender by a fine, and not to interfere with that, but to try the question of right, whether the person to whom the place belongs has a right to have the steps there or not. I cannot construe this act as being intended to put in the power of the Magistrate acting as a conservancy authority the decision of questions of property which might be of the utmost importance to persons. And to do so without there being any appeal from his decision; for I cannot regard the provisions of section 92, which seems, in one stage of this suit, to have been relied upon as protecting the Magistrate from an action, as being in any way whatever a remedy by appeal. It seems to me to have been intended for quite a different purpose.

I think, therefore, that Mr. Justice Markby's decision that the action was not barred either by Act XVIII. of 1850 or by the general law is a right one, and that this appeal ought to be dismissed with costs.

Jackson, J.—I entirely concur in the judgment which has been just delivered, and have very little to add. I can only say that it seems to me that it would be matter of the most serious consequence if Magistrates in addition to being protected in the discharge of their purely judicial functions, were also so far inviolable in their executive capacity that they should be at liberty to make orders in the conservancy branch of their duties which should not be liable to question in any form or shape. It would be simply placing property in towns where such Acts came into operation absolutely at the disposal of the Magistrate for the time being. The section referred to by the learned Chief Justice is manifestly one, I think, intended to give the Government and the Commissioners the power of controlling, in an executive way the proceedings of the Magistrate under the Act; and it would be, if it could be used at all for such a purpose, a very inadequate substitute for that right which every subject ought to have of submitting questions of this kind to the decision of the Civil Courts.

Ainslie, J., concurred.

The 24th March 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Settlement—State Policy—Jynteah.

Case No. 1365 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 24th March 1873, affirming a decision of the Moonsiff of Parkool, dated the 2nd November 1872.

Shaikh Sonam and another (two of the Defendants), *Appellants,*

versus

Katoo Meah and others (Plaintiffs), *Respondents.*

Baboo Rajendronath Bose for Appellants.

Baboo Grish Chunder Ghose for Respondents.

State policy has nothing to do with the question whether a plaintiff or defendant has the right to a settlement made by the Collector of land in Jynteah, and the Civil Court has jurisdiction to determine such question in a civil suit.

Glover, J.—An attempt has been made to bring a question of State policy into this case, and to have it declared that under the circumstances in which the State of Jynteah was taken under the direct authority of the British Government no civil suit would lie to set aside the order of the Collector giving a settlement of the lands in suit to the defendants, and that as a matter of fact the Collector was fully at liberty to make the settlement with whomsoever he pleased to make it, and that such settlement cannot be set aside in the absence of the Collector. But really this case has nothing to do with questions of State policy, for, on turning to the record, we find that both parties, the plaintiffs and defendants, claim the lands in suit as appertaining to their own holding, and the Collector deciding between these two gave the settlement to the defendants. The question before the Civil Court was very much the same as that before the Collector, that is, to the original holding of which party did the land in suit belong. There was nothing to oust the jurisdiction of the Civil Court, or to prevent the Moonsiff from deciding the case as laid before him. There was no question as to the power of the Collector to give a settlement to whomsoever he pleased. The only point was whether the land belonged to the settled estate of one person or of another, and the Moonsiff decided that it belonged to plaintiffs' estate. The question whether the Civil Court had jurisdiction or not was never thought of in either of the Courts below, and the other objection, that the Collector ought to have been made a party, also falls through with reference to the nature of the subject-matter of the suit. If it had been a case in which the interests of the Government were concerned, no doubt, according to the late ruling of the Full Bench,* the Collector would have to have been made a party; but as it is, the Government has no interest in the matter. It is not sought to interfere with the terms of the settlement, and it is all the same to Government whether the plaintiffs or the defendants are declared entitled to the benefit of that settlement and to pay revenue into the Government treasury.

The special appeal is dismissed with costs.

The 25th March 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Private Arbitration—Withdrawal—Act VIII. of 1859, s. 327.

Case No. 382 of 1873.

Special Appeal from a decision passed by the Additional Judge of Tipperah, dated the 22nd August 1872, affirming a decision of the Moonsiff of Nusseergunge, dated the 10th April 1871.

Ram Coomar Shaha (Defendant), *Appellant,*

versus

Kala Chand Shaha and others (Plaintiffs), *Respondents.*

Baboos Ashootosh Dhur and *Debendro Narain Bose* for Appellant.

Baboos Grish Chunder Ghose and *Bharut Chunder Dutt* for Respondents.

A party is not entitled to withdraw, without good cause shown, from a submission to arbitration.

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* *Ante*, p. 327.

Where an award was about to be pronounced and a party withdrew on the ground, *1st*, that the arbitrator was entering into foreign matters, and, *2ndly*, that a minor was likely to be interested who would not be bound, the grounds were held not to constitute a good cause for withdrawal.

Kemp, J.—THE points taken in special appeal in this case are: *1st*, that the Judge is wrong in law inasmuch as he has not tried the question raised in the second ground of appeal before him, namely, that the reference to arbitration having been made on the 18th Jeyt 1266, and the appellant having withdrawn from his submission to arbitration on the 24th of Bysack 1277, before the award was pronounced, such award is void and not binding upon him; *2ndly*, that no time having been fixed within which the arbitrator was to deliver his award, the arbitration is void *ab initio*. This second point was not taken in the Court below. There is a general ground that the award is contrary to law, but it is very clear that it could not have been pressed upon the Judge, as the Judge's decision is entirely confined to the question, and to that question alone, whether the award could be set aside on account of the improper conduct of the arbitrator in borrowing money from one of the parties to the case. The decision of the Judge is very full on this point, and he finds clearly that there had been no corruption and nothing improper in the conduct of the arbitrator. We therefore refuse to go into that point at all.

Then with reference to the other point, that point admittedly was taken in the Court below in the second ground of appeal to the Judge, which is to this effect, that the appellant having withdrawn from his submission to arbitration previous to the delivery of the award, he is not bound by that award. This objection also was not pressed in the Court below. Had it been pressed, it surely would have been noticed by the Judge, as, if that objection could have been maintained, it would have avoided, on the ground of the arbitration being bad in law, all necessity for going into the question whether the conduct of the arbitrator had been corrupt; but as it has been taken in the petition of appeal before the Judge, and in special appeal, we think proper to decide it.

The arbitration in this case was a private one. Now the only section in the Code which applies to private arbitrations is section 327. There is a case decided by the Privy Council, reported in Volume X., Weekly Reporter, Privy Council Rulings, p. 51, Pestonjee Nusserwanjee *vs.* D. Manockjee & Co. There can be no doubt that that also was a private arbitration, and a memorandum at the foot of it states that the submission to arbitration was made in conformity with the provisions of section 327. The point in that case was whether the Court had the power to direct the submission to arbitration to be filed; and their Lordships held that although there was a statement in the submission to arbitration that it was made in conformity with section 327, that was merely introduced for the purpose of caution, and that although section 326 was not expressly referred to in the submission to arbitration, the arbitration itself was subject to all the sections in the Code on this subject. Therefore applying section 326 to that particular submission in that particular case, they held that the Court had jurisdiction to direct that the submission to arbitration should be filed. Then they go on to say generally, laying down as a broad principle of equity, that according to a proper construction of the Code, when persons have agreed to submit matters in difference between them to arbitration, no party to such submission can revoke it unless for good cause shown, and that no mere arbitrary revocation of that authority could be permitted; and then they refer to certain cases under the English law on this point, which they observe has lately been modified so as to agree with the Indian law on the subject, and they held, as we have already stated, that a party was not entitled to withdraw without good cause shown from a submission to arbitration.

In this case we have referred to the reasons given by the special appellant as having induced him to withdraw, and we may observe that his withdrawal was not made until all the proceedings in the arbitration were completed, and the arbitrator was about to pronounce the award. Those grounds were, *1st*, that the arbitrator was entering into matters quite foreign to the subject of difference between the parties; and, *2ndly*, that a minor was likely to become interested in these proceedings which would not bind him, and therefore the arbitrator had better drop them. These grounds constitute, as properly found by the Court below, no good cause for withdrawal from the submission to arbitration.

We therefore dismiss the special appeal with costs.

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The 26th March 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice.*

Court Fees—Administration—Doubtful Claim—Act VII. of 1870, Sch. I., cl. 2.

Case submitted to the Chief Justice by Mr. K. Belchambers, Taxing Officer of the High Court, under section 5 of the Court Fees Act, 1870.

In the Goods of Edward Lane Beake, *deceased.*

In a petition for letters of administration, where the Administrator-General, in valuing the assets which were likely to come into his hands, represented it to be doubtful whether a portion of a certain claim would be realized, and urged that such portion was not liable to the stamp-duty prescribed by the Court Fees Act (1870), Sch. I., cl. 2:

HELD that no sufficient ground had been shown for the exemption claimed.

Case.—IN this case the petition of the Administrator-General for letters of administration of the property and credits of Edward Lane Beake, deceased, contains the following statement as to assets:—

"The amount or value of assets, which are likely to come to your petitioner's hands, in the event of such letters of administration being granted, will not, to the best of your petitioner's belief, exceed Rs. 18,500, and is as follows:—

In the High Court, deposit as security for costs in suit—

	Rs.
Beake *vs.* Happerfield	2,000
Now payable by Mr. Landray ...	3,500
Balance payable by Mr. Landray by instalments, besides interest ...	8,700
Claim against persons at Lucknow (payment being made by instalments)	950
Claim against Lane & Co., Meerut	13,000

Out of which last-mentioned sum it is doubtful whether more than Rupees three thousand five hundred will be realized."

Upon the doubt expressed as to whether the claim against Lane & Co. for Rs. 13,000 is good for more than Rs. 3,500, it is submitted, on behalf of the Administrator-General, that the difference (Rs. 9,500) between those two sums is not liable to the stamp-duty prescribed by the Court Fees Act, 1870, Schedule I., clause 2.

There is no provision in the Court Fees Act authorizing exemption in respect of a claim supposed to be doubtful; nor is there any such provision in the Acts by which the payment of probate-duty in England is regulated.

If duty be paid on an exaggerated valuation of an estate, a refund of the amount paid in excess may be obtained, in England, under 35 Geo. III., c. 184, s. 40, and in this country, under the Financial Notification No. 2025, dated 15th August 1872, which provides that "the Local "Governments may sanction refunds of "stamp-duty, when the estimate of the assets "of an estate is shown to have exceeded the "amount on which the Act says that duty "shall be paid, namely, the actual value of "the property in respect of which the "letters of administration are granted." (*Gazette of India*, 17th August 1872, Part I., p. 782.)

Order of the Chief Justice.

No sufficient ground is shown for the duty not being payable on the Rs. 9,500.

The 26th March 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Sale of Putnee—Service of Notice—Onus Probandi—Act I. of 1872, s. 106.

Case No. 354 of 1873.

Special Appeal from a decision passed by the Additional Judge of Tipperah, dated the 24th August 1872, modifying a decision of the Moonsiff of that District, dated 6th April 1871.

Doorga Churn Surma Chowdhry (one of the Defendants), *Appellant,*

versus

Syud Najunooddeen (Plaintiff) and others (Defendants), *Respondents.*

Baboos Nullit Chunder Sen and *Mohinee Mohun Roy* for Appellant.

Baboos Sreenath Dass and *Bharut Chunder Dutt* for Respondents.

In a suit against a zemindar to reverse the sale of a putnee tenure held under Regulation VIII. of 1819, on the ground of non-service of notice, the onus of proving service lies on the defendant, according to the spirit of s. 106 of the Evidence Act.

Glover, J.—THIS was a suit to reverse the sale of a putnee tenure held under Regulation VIII. of 1819, on the ground of informality. The plaintiff alleges that the notice required by clause 2, section 8 of that Regulation, was not served. The points

we have to decide in special appeal are, was the Judge right, when deciding this question, to place the onus upon the defendant, and ought not the plaintiff, coming into Court alleging non-service of notice and consequent fraud, to prove that allegation? Secondly, supposing the sale to be set aside, ought not the purchaser to get back the purchase-money?

On the first point, we think the onus was not improperly laid on the defendant according to the spirit of section 106 of the Evidence Act, namely, the fact was especially within the knowledge of the defendant, and the burden of proving that fact ought to have been upon him. The defendant was the zemindar, and was, under the section of the Regulation above quoted, burthened with the entire responsibility of serving the usual notices; and it was within his special knowledge whether such notice had been served or not. It does not appear after all that the Court below did lay any special onus on the defendant to prove this fact, for we find that there were witnesses on both sides, and a great number of witnesses were examined on the part of the plaintiff to prove that no notice was served, and the Court below probably came to the conclusion that it was not served as much upon the direct evidence of plaintiff's witnesses as upon the failure of the defendant to prove such service as he was bound to do.

As to the repayment of the purchase-money, it seems that no application was made for this refund, and the decision of the first Court makes it very clear that there was no real contest between the parties upon this point, the purchaser and the zemindar being one and the same person; and, if the purchaser wanted his money back, he should have applied for a refund to the Courts below. It is said that there was no necessity for making such an application in the first Court, inasmuch as the sale of only 2 annas had been set aside, and it was not until the whole sale had been set aside by the Judge that the question of refund arose. But the question as to the remainder of the estate had nothing to do with the defendant. It was a question between the plaintiff and the heirs of her husband as to their respective shares in the estate which would not affect the principle on which the money was to be refunded; and, as the defendant did not choose to make that application for a refund to the Judge, we ought not to take that objection into consideration now. The result is that the appeal must be dismissed with costs.

The 26th March 1874.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Kabala—Construction—Benamdar—Beneficial Owners.

Case No. 137 of 1873.

Regular Appeal from a decision passed by the Judge of East Burdwan, dated the 3rd April 1873.

Bissessuree Debia (Plaintiff), *Appellant,*

versus

Gobind Pershad Tewaree and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Doorga Mohun Doss* for Appellant.

Baboos Ashootosh Dhur, Chunder Madhub Ghose, and *Gooroo Doss Banerjee* for Respondents.

In a kabala by which certain landed property was conveyed, the vendor bound herself in the following terms: "If any one objects to my sale, and gives you any sort of trouble, I will arrange it, and, if I fail to do so, I will restore the purchase-money; in default, you may realize it by an action:" HELD that it was intended to provide, not only against defect in the power of the vendor as a Hindoo widow, but against any disturbance of the purchaser, and to protect him against dispossession.

All the covenants made by a benamdar in the sale of a property are not necessarily binding upon the true owners; though there may be circumstances under which a person, whose name does not appear upon a contract, may be liable to perform its conditions.

Markby, J.—THE suit in this case is brought for refund of the consideration-money of a putnee talook, the amount claimed being Rs. 22,200.

The substance of the plaint is that the defendants Nos. 1 to 3, who are called the male defendants, and their late uterine brother, Soonder Narain Tewaree, being in all four brothers, purchased lot Chargram, a putnee mehal, from Nund Kishore Doss, the late mohunt of Rajgunge Akhra; that one Soonder Narain died leaving the male defendants in possession; but that, they having failed to pay rent for the putnee due to the zemindar, the property was put up to sale, and purchased for Rs. 22,500 by the male defendants; that, subsequent to this, they presented a petition praying that the name of their mother Champa Coomaree, who is the defendant No. 4 in this suit, should be inserted as purchaser in their place, and the Collector, in compliance with that petition,

nserted her name accordingly; that, afterards, the male defendants being considerably ndebted to the plaintiff, they sold the proerty to the plaintiff, and caused a kabala to e executed by the female defendant for a onsideration of Rs. 22,200, and that they emselves being the real owners have witessed this deed. Then the plaintiff goes n to say that, as regards the consideration-oney, a sum of Rs. 12,672-8 was deducted part satisfaction of the debt due by them certain bonds which they had executed her favour; Rs. 3,950 was deducted in rt liquidation of the money due on mortge of certain personal property, and the lance, Rs. 5,577-8, they have received cash and in currency notes, and the plaintf got into possession of the property under r purchase; that subsequently the person ppointed by the High Court as Receiver of e estates belonging to the Rajgunge Akhra spossessed her; that thereupon she applied the defendants, either to have the matter ith regard to the estate set straight, or efund the consideration-money as stipulated the kabala, and that they did not do so. herefore she brought this suit.

Now, the Judge has not taken the evidence the cause; but upon that plaint he has eld that there is no cause of action. That uestion turns upon the construction of the abala upon which this suit is based, and nder which the plaintiff says that she is ntitled to recover, and we must assume that the kabala is as the plaintiff states it to be. We must assume also that she will be able to establish the facts which she states in the plaint. If this be so, I think that her suit ought to be tried. The important words of the kabala are: "If any one objects to my "sale, and gives you any sort of trouble, I "will arrange it, and, if I fail to do so, I will "restore the purchase-money; in default, "you may realize it by an action." Now, the main question which we have to decide is as to the construction of that clause in the document. The respondents sought to restrict it in two ways: They say in the first place that it was only a covenant which had reference to the peculiar position of this lady (defendant No. 4) as a Hindoo female, and that it was not intended to provide against any general defect of title, but only against any defect in her power as a Hindoo widow to dispose of property of this kind. I do not see any words in this very general clause upon which any such restriction can be founded; the words "in any way cause trouble" seem to me to be quite wide enough to cover any disturbance of the plaintiff. If the vendee had really considered herself as having no interest in this property, of course it is not antecedently probable that she would make so extensive a covenant, but in fact she claims the property as her own, and denies that she merely represented her sons. The same remarks apply to the other restriction which it has been sought to put upon the covenant. The District Judge says that "it has been argued that the words 'if any one gives you any sort of trouble' cover the dispossession." But he says that "it must "be remembered that there was no inter-"ference and no trouble given for more than "a year, during which the plaintiff says she "was in quiet possession. As she would "read it she has a guarantee for all time, and "thus the stipulation becomes bad for very "indefiniteness." I find some difficulty in adopting this reasoning It seems to me that this covenant was expressly framed to protect the purchaser against dispossession—it is something like a covenant which English lawyers would call a "covenant for quiet enjoyment;" and I see no reason whatever for doubting that it was intended to provide against a disturbance of possession by any person whatsoever. As the Judge remarks in another part of his judgment, in all probability the circumstances which preceded this sale were such as might raise some doubt as to the title of the vendor, and that they were known to the vendee; and, for that reason, in order to meet any possible opposition from third parties, this clause was put in. It seems to me, therefore, that neither of these restrictions which have been contended for can be put upon this clause. I think it must be taken as a general covenant that, in case of disturbance by any person whatever claiming title to this property, the party would have a right to recover. That seems to me to be the proper construction to be put upon this document. Therefore all that we need say now is that the District Judge, in our opinion, was wrong in saying that the plaintiff had no cause of action, and that this covenant was to be restricted in the way in which it is sought to be restricted by the parties. Whether or no, upon the ultimate facts that may be proved in this case, there is any ground for recovering in this suit is a point upon which we express no opinion whatever. We are asked to consider whether, even upon the construction which we put upon the document, there has been a breach of it. But we have not any evidence on the record

for the determination of this point. We think, therefore, that the case must be sent back to the Court below for this purpose.

Then, another question has been raised, namely, who are the parties liable upon this covenant. Now, the covenant is signed by a person named Champa Coomaree Dossee, and it appears that, at the time when this transaction took place, the plaintiff (if she speaks truly) believed that Champa Coomaree was not the owner of the property, but that the three male defendants were so. It is contended before us that because Champa Coomaree was only what is called a benamdar, that therefore all the covenants which she made in this transaction are binding upon the true owners of the property. But no authority for that very general proposition is produced before us, and I certainly do not feel inclined or authorized to lay down any such proposition. There may be circumstances under which a person whose name does not appear upon a contract may be liable to perform its conditions, but I do not find in this plaint any circumstances stated upon which we should be justified in laying down that the male defendants, even if they be the real owners of the property, are liable to perform this covenant. Whoever may be the real owners of this property, this document expressly declares that the female defendant is in possession of it, and that she purchased it with her own money, and that she sells it to the plaintiff. Therefore the plaintiff and the female defendant alone can be treated as parties to this contract; and it is this contract alone which the plaintiff now seeks to enforce. Whether the male defendants would have been liable had the plaintiff's case been that their names were not disclosed in the transaction, although they were the real vendors, it is not necessary to determine. I think it must be taken upon this plaint that the plaintiff knowing the circumstances has elected to deal with the female defendant on the footing that she is the owner.

It appears to me, therefore, that, so far as the three male defendants are concerned, the suit was rightly dismissed, and that the appeal, as against them, ought to be dismissed with costs. But, as regards the defendant Champa Coomaree Dossee, the suit must be remanded to the lower Court in order to try whether or no there has been a breach of covenant; and, if so, what damages the plaintiff is entitled to. Costs of remand will abide the ultimate result.

Birch, J.—I concur.

The 26th March 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Permissive Possession— Right of Occupancy— Act VIII. (B.C.) of 1869, s. 6.

Case No. 607 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of Mymensingh, dated the 30th December 1872, reversing a decision of the Sudder Moonsiff of that District, dated the 26th August 1872.

Mohur Ali Khan Pathan and others (Defendants), *Appellants,*

versus

Ram Ruttun Sen (Plaintiff), *Respondent.*

Baboo Tarinee Kant Bhuttacharjee for Appellants.

Baboo Bykuntnath Doss for Respondent.

Mere possession of a permissive character and without any right cannot confer a right of occupancy.

The words "cultivated or held" in Act VIII. (B.C.) of 1869, s. 6, have the effect of excluding lands occupied exclusively by buildings from the right of occupancy there declared.

Kemp, J.—The plaintiff, special respondent in this case, sued for khas possession of a very small portion of land on which the defendants held a shop, stating that the land in question was within the plaintiff's ijara; that the defendants were holding without any right of occupancy; that he served them with a notice of ejectment, but that they still remained on the land. The defendants contended that no notice had been served; that they had acquired a right of occupancy; they also referred to a former suit, and alleged that the present suit was barred under section 2 of Act VIII. of 1859. They also questioned the plaintiff's right to hold the land in question as ijaradar.

The first Court found that the previous decree was not *res adjudicata*, and that the plaintiff was the ijaradar. Then, on the question whether notice had been served or not, he found that notice had not been served, and, on that ground alone, dismissed the plaintiff's suit.

On appeal to the Subordinate Judge, he found that there was ample proof that notice had been served upon the defendants, and then, with reference to the alleged occupancy-right of the defendants, he held

it mere possession of a permissive racter, and without any right whatever, uld not confer any occupancy-right on the fendants; and he alludes in support of this w to a decision of this Court reported in lume XVII., Weekly Reporter, p. 383.

The grounds taken in special appeal are, , that the lower Court was wrong in ding that the defendants had not acquired ight of occupancy, and that the decision ted in the 17th volume was not applicable the present case; *2nd*, that the Lower ellate Court was wrong in assuming that defendants held this land without any t, without first adjudicating whether y had held the same for twelve years or not. third point is also taken now which was t raised in the grounds of special appeal. e point is a very ingenious one, namely, t, as this suit was tried under the provi- ns of Act VIII. (B.C.) of 1869, section 6, ich enacts that every ryot who shall have ivated or held "land" for a period of ve years shall have a right of occupancy e land so cultivated or held by him, whe- r it be held under a pottah or not; and as word "land" has been interpreted by a ious Act [Act V. (B.C.) of 1867] to ude houses and buildings and corporeal editaments and tenements of any tenure, ess where there are words to exclude es and buildings, or to restrict the ning to tenements of some particular re, therefore the decision of this Court ch were passed under the provisions of X. of 1859 do not apply to the present . Now it is very clear that this Court held in a series of decisions that the upation intended under section 6, Act I. of 1869, is occupation of land which is subject of agricultural or horticultural ivation, or used for purposes incidental reto, and does not include land exclusively d for dwelling-houses, buildings, &c. s point, therefore, not having been taken special appeal, we are not prepared, in a y suit of this description, valued at 6-9-2, to re-open a question which has n settled by concurrent decisions of this rt for a series of years, and by which are bound.

It has been found, and indeed it is an mitted fact, that the land in suit is of a y small area, and occupied by a shop. It s also been found that the defendants were lding that land permissively, and without y right at all, much less a right of occu- ncy, and that notice was served upon them. e must, therefore, hold that the decision of the lower Court was a proper decision, and the appeal must be dismissed with costs.

Glover, J.—I wish to add one word to this judgment: Speaking for myself, I doubt very much whether the words of section 1, Act V. of 1867, apply at all to the rulings in question. It says that the word "land" shall *include* houses, buildings, &c., unless where there are words to exclude houses and buildings, and I am inclined to the opinion that the words "cultivated or held" in section 6, Act VIII. of 1869, would have the effect of excluding lands occupied exclusively by buildings.

I concur in dismissing the special appeal with costs.

The 27th March 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Abatement of Rent—Act X. of 1859, s. 4—Presumption of Uniform Payment.

Case No. 715 of 1873.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 11th January 1873, affirming a decision of the Moonsiff of Putneetollah, dated the 31st August 1872.

Radha Gobind Roy (Plaintiff), *Appellant,*

versus

Kyamutoollah Talookdar (Defendant), *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Anund Gopal Pallit for Respondent.

Where an abatement of rent was allowed in a lump sum upon a lump jumma on account of lands having been rendered unculturable by the overflow of a river,

the abatement was held not to vary the rate of rent so as to debar the ryot from the benefit of the presumption under Act X. of 1859, s. 4.

Glover, J.—This was a suit for enhanced rent after notice. The only question we have to decide in this special appeal is whether the Judge is right in holding that there has been no variation in the rent of the land. The defendant filed evidence to prove the continuous payment of the same rate of rent for twenty years, and claimed the benefit of the presumption under section 4 of the Rent Law. The zemindar-plaintiff contends that, inasmuch as in the year 1257 the defendant ryot got an abatement of rent in consequence of certain lands within his jote having been rendered unculturable by the overflow of the river, that fact alone shows that the rent has varied, and that the defendant is, therefore, not entitled to the benefit of the presumption.

It appears from the order of the zemindar passed on the petition of the ryot that 20 beeghas odd cottahs of land were rendered unculturable, and an allowance was made for that land by a reduction on the total jumma of Rs. 9-4. If the whole of the land held by the defendants had been rated in the zemindaree books at so much per beegha, then, inasmuch as the 20 beeghas 9 cottahs 4 chittacks on which the abatement was allowed would not, at the rate of reduction granted, make up the exact rental of Rs. 9-4, it would be difficult perhaps to say that that reduction did not involve a variation in the jumma which might have the effect of depriving the ryot of the benefit of the presumption under section 4; but the land was not leased at so much per beegha, the jumma being a lump one of Rs. 96 upon a total area of 106 beeghas, and the decrease of the rental on account of the unculturable lands was not therefore a rateable one at so much per beegha upon the whole land, but a lump reduction. It can hardly be said, therefore, that there has been any variation in the terms of the section, because the quantity of land which the defendant now holds being taken into consideration, the rent which he now pays is the same in proportion to the quantity of land which he held before the river overflowed its banks, and covered a portion of his lands with sand. There has been a certain quantity of land struck off, and a certain amount of rent reduced, but the proportion remains the same, and he is relatively in the same position now as he was then.

There is a case reported in Volume X, Weekly Reporter, p. 247, Mussamut Ruzumnissa *vs.* Tookun Jha, where the same doctrine is laid down, and it seems to that it would be unjust if the principle the Act could be got rid of by a side-wi like this, and the defendant, who is an ryot on land occupied by his forefather could be made to lose all the advantages th law gives him, simply because, unfortunate for him, the river having passed over his la and a certain quantity of it became uncultu able in consequence, he was obliged to ent into a different arrangement with th zemindar. It has been found, on the whol evidence in this case by both the lowe Courts, that there has been no variation i the rate of rent, and that the only change i the total rental has been caused by the los of part of the holding by the action of th river.

I would dismiss the special appeal with costs.

Kemp, J.—I entirely concur. I wish to add a few words to this judgment. The argument of the pleader for the special appellant appears to me to amount to this:. That, inasmuch as in 1257, according to a likhun, the rate was assumed to be 12 annas per beegha, and at that rate the reduction on 20 beeghas 9 cottahs 4 chittacks, the quantity of land which was found on inquiry to have diluviated, would not come to Rs. 9-4, the amount remitted, but to Rs. 15 odd annas; therefore it must be inferred that the rate did not remain the same; but I find on referring to the likhun that the rate of 12 annas therein mentioned was not the rate for the whole land; for, if that had been the case, a jumma of Rs. 96 on a total area of 105 beeghas would not yield 12 annas a beegha; but the fact is that in the likhun the lands diluviated are described as paddy lands, and it was assumed that they are worth 12 annas a beegha; but the deduction made was not at the rate of 12 annas per beegha; it was a deduction of a lump sum of Rs. 9-4 upon a lump jumma of Rs. 96. Therefore the rate not having been, in my opinion, changed, the ryot-defendant is entitled to the presumption under section 4, it having been proved that he has paid at the same rate for twenty years, and that he has held the land for a very long period at a uniform rate of rent.

I concur in dismissing the special appeal with costs.

The 27th March 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,

Judges.

Presumption under Act X. of 1859, s. 4—Dakhilas.

Case No. 755 of 1873.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 24th January 1873, affirming a decision of the Moonsiff of Putneetollah, dated the 16th September 1872.

Radha Gobind Roy (Plaintiff), *Appellant,*

versus

Shama Soonduree Dabee (Defendant), *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Nullit Chunder Sen for Respondent.

A ryot is not bound to file dakhilas in order to establish the presumption allowed by Act X. of 1859, s. 4, if he can establish it by other good independent evidence.

Kemp, J.—The point taken in special appeal is that the Lower Appellate Court is wrong in law in using the chit of 1257 as evidence of twenty years' uniform payment of rent. The suit was for enhancement of rent, and the defendant pleaded the presumption under section 4. He stated that a uniform jumma had been paid by him for a very long period, but that the dakhilas which he could have produced in support of that plea had been destroyed by fire, and he examined witnesses to prove that his house had been burnt down. The defendant, therefore, relied upon a chit of the year 1257. This chit has been found by both the lower Courts to be proved, and it is admitted by the amlas of the zemindar who have been examined in this case. The chit shows the jumma paid for the year 1257 to be Rs. 40-13-5, which is the same jumma as that mentioned in the notice of the plaintiff in 1277 From this chit both the Courts below have inferred that the defendant has established the presumption of law under section 4, and both Courts say that the plaintiff has not been able to rebut that presumption; that the plaintiff does not say nor does he try to make out that there has been any variation of the defendant's rent, but that the plaintiff tried to show that the defendant's tenure commenced subsequently to the permanent settlement; and it does not appear from the decisions of both Courts that the plaintiff did, in rebuttal of the presumption which the Court found arose in the case, say that the rates had varied within twenty years prior to suit. What the plaintiff said was that the tenure was created subsequently to the permanent settlement. There is a case in Volume XIX., Weekly Reporter, p. 205—Ram Bhurosee Singh *vs.* Syud Mahomed Ashguree Khan—in which it was ruled that there being a "chit" of 1257 in one case showing what the rates were in that year, and there being no evidence to prove that the land had not been held at a uniform rate, the presumption under section 4 arose. Then in Volume V.* there is also a case in which it has been decided that, generally speaking, a ryot should produce dakhilas or other good and independent evidence, and the Zilla Judge in that case had relied upon the evidence of the defendant. The Court observed that in special appeal they could not interfere with the Judge's finding if he had chosen to rely upon that evidence, as it could not be said that it was not admissible evidence, but that, generally speaking, the ryot should prove such payments by dakhilas or other good independent evidence. There has been in this case good independent evidence, and as the law does not lay down that the ryot is bound to file dakhilas to establish the presumption under section 4, the special appeal must be dismissed with costs.

* Act X. Rulings, p. 89.

The 27th March 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Abatement of Rent—Ryots' Rights—Diluvion—Act VIII. (B.C.) of 1869, s. 18.

Case No. 737 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Kungpore, dated the 24th December 1872, affirming a decision of the Moonsiff of Badeakhally, dated the 30th September 1871.

Babun Mundle (Plaintiff), *Appellant,*

versus

Shib Koomaree Burmonee (Defendant), *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Ashootosh Dhur for Respondent.

A ryot cannot sue for abatement of rent, simply because the lands which he holds are rated higher than those of the same description and with similar advantages held by ryots of the same class in the vicinity.

Act VIII. (B.C.) of 1869, s. 18, refers to an alteration of area, owing to a portion of the land having gone away by diluvion or otherwise, not to some difference in the length of the measuring pole in use at different periods.

Glover, J.—Two objections are taken in this special appeal: *1st*, that the Subordinate Judge has not considered the objection of the plaintiff that the land which he held was land of a description for which ryots of the same class and with similar advantages in the vicinity paid less than himself; and, *2ndly*, that he has decided the question of area without taking into consideration the kanoongoe papers which were produced from proper custody, and were good evidence in the case.

The first objection is not sustainable under the Rent Law, and section 18 does not allow it as one of the grounds on which a ryot can claim an abatement. A ryot can claim abatement on two grounds: *1st*, that the area of the land which he holds has been diminished by diluvion or otherwise; and, *2nd*, that the value of the produce, or the productive powers of the land, have been decreased by some cause beyond his, the ryot's power. He has not got the privilege of suing for abatement, simply because the lands which he holds may be rated higher than those of the same description and with similar advantages held by ryots of the same class in the vicinity.

Then, as to the kanoongoe papers, we are by no means certain that the Court below has not considered them; but, supposing that it has not done so, it would be useless for us to remand the case on that account because it is clear that these papers could have had no effect upon the point which has been decided. For it cannot be said that because of some difference in the length of the measuring pole in use at different periods the area of the land in the sense of the section has been altered. The land is exactly as it was before and within the same boundaries. What we understand the meaning of section 18 to be as regards diminution of area is that, when the land is not as it was before, and when a portion of it has gone away by diluvion or otherwise, abatement may be claimed. But here the only question is whether the land within certain fixed boundaries is to be called so many beeghas or so many cottahs. The contract between the zemindar and the ryot was not changed and the latter agreed to hold a plot of land within certain boundaries irrespective of area.

We therefore dismiss the special appeal with costs.

The 30th March 1874.

Present:

The Hon'ble E. G. Birch, *Judge.*

Damage—Nuisance—Right of Action.

Case No. 1204 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of Sarun, dated the 12th March 1873, reversing a decision of the Moonsiff of Chuprah, dated the 23rd September 1871.

Ajoodhya Misser (Plaintiff), *Appellant,*

versus

Buru Dutt Pandah (Defendant), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Judoonath Sahoy for Respondent.

A suit, in which the cause of action was that defendant had opened a new drain abutting on plaintiff's house, and thereby created a nuisance on plaintiff's premises, and did damage by undermining his wall, having been dismissed by the Lower Appellate Court, on the ground that no suit would lie, if a man cut a drain from his house into a public lane:

HELD that the question was whether plaintiff had sustained the damage alleged, and he was entitled to a finding as to whether he had proved his case.

: Moonsiff's order and dismissed the it, simply on the ground that in his inion no suit will lie if a man cuts a drain m his house into a lane used by the blic. I gather from the Subordinate dge's judgment that he has not gone into e evidence at all in this case, but has rown it out on this preliminary point; at y rate there is nothing in the decision of e Subordinate Judge to show that he has nsidered the evidence.

The plaintiff's cause of action was that e defendants had opened a new drain utting on his (plaintiff's) house, which ain created a nuisance as to his premises, d also did damage by undermining his wall. It cannot be said that if a man by the act another sustains any special damage or convenience in the way of nuisance, he is be deprived of any remedy in the Civil ourt. The question to be determined is hether the plaintiff has sustained the special mage which he alleges. Whether the vidence on the record is sufficient to tablish this point or not, it is not for me say. But it is quite clear that the plaintiff entitled to a finding from the Subordinate udge as to whether he has proved the case et up or not, and whether on the evidence e is entitled to the relief prayed for.

The case must accordingly be remanded to the Lower Appellate Court for re-trial. Costs (hereby assessed at Rs. 16) will abide the result.

The 30th March 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Misconduct of Employe—Right to Wages—Admission by dismissed Manager.

Reference to the High Court by the Moonsiff exercising the powers of a Judge of the Small Cause Court at Raneegunge, dated the 28th January 1874.

Kalee Churn Rawanee, *Plaintiff,*

versus

The Bengal Coal Company, represented by their General Manager, Mr. N. Kenny, *Defendant.*

A finding of fact that an employé is entitled to his wages notwithstanding subsequent misconduct, is not wrong in law.

is dismissed, whether the dismissal is or is not upon such a notice as the manager has a right to demand.

Case.—PLAINTIFF sues the defendants, the Bengal Coal Company, for recovery of wages for October and half the month of November last at the rate of Rs. 5 per month. It is stated by him that he used to serve the Company as their chaprassie, and did serve them till 15th November last, and that, on the 16th November, Mr. N. Kenny, their general manager, sent him to the Criminal Court at Raneegunge on a charge of theft of coal, where he was sentenced to suffer one month's imprisonment, and that after the expiration of that term he went to Mr. Kenny to claim his salary for October and fifteen days of November last due to him, which was refused to be paid to him, whereupon he brought this suit.

The Bengal Coal Company are sued by representing their general manager, Mr. Kenny.

To prove the claim, plaintiff solely depended upon the evidence of Mr. Kenny, who having appeared admitted the claim and said that he ordered the naib of the Company to pay the plaintiff's claim into Court.

But, on the other hand, Mr. S. Pell, as general manager of the Company, appeared by pleader, and says by filing a written statement (which he is not bound to file in a Small Cause Court suit) that he is the manager, and that plaintiff cannot claim his salary, inasmuch as he forfeited it owing to his misconduct. Mr. Pell does not deny that plaintiff used to serve on a salary of Rs. 5 per month, nor does he deny that plaintiff's salary for October and fifteen days of November last are due. What he states is that plaintiff cannot claim salary when he was found guilty of stealing the Company's property.

The point to be tried in the case is whether plaintiff is entitled to recover his salary or not.

It is a matter of astonishment that one manager of the Company, *viz.*, Mr. Kenny, admits the claim of plaintiff and says to the Court that he ought to be paid, inasmuch as theft by plaintiff was a separate charge wholly unconcerned with the claim for salary, whereas the other manager, Mr. Pell, urges before the Court that plaintiff is not entitled to his salary. I am rather in a difficult position to try this case. It appears from Mr. Kenny's evidence that the Hon'ble Mr. T. M. Robinson, the managing director of the Bengal

Coal Company, has dismissed him in this month of January. It does not appear from his deposition on what grounds Mr. Robinson dismissed him. He says that he is yet the manager of the Bengal Coal Company under his letter of appointment of 18th August 1873 (Exhibit B), when Mr. Robinson under the terms of that letter has not given him three months' notice to retire.

The question now is whether, under the circumstances as stated by Mr. Kenny, his admission can bind the Company to pay plaintiff's debt or not. In order to decide this question, the terms of the letter of appointment should be referred to as well as Mr. Kenny's evidence on oath. The letter of appointment of 18th August 1873 (Exhibit B) filed by Mr. Kenny is to this effect: "The engagement to commence from the "1st instant, and to be terminable by the "Company giving you three months' notice, "or by your giving the Company six months' "notice."

Now the evidence which Mr. Kenny gives is this: "I am now the manager of the "Bengal Coal Company according to my "letter of appointment of 18th August 1873 "(Exhibit B). The managing director, Mr. "Robinson, has sent up Mr. Pell to act in "my place as manager without giving me "any notice under the letter of appointment. "I have not given over charge to him as "yet, and I declined doing so, so long as my "commission on the present half-year is not "settled. Under the letter of appointment "Mr. Robinson at least should give me "notice, that is, three months' notice, before "he dispenses with my services. Within "the present month of January, Mr. Robin-"son wrote to me a letter stating that 'the "Board has dismissed you and appointed "one Mr. Pell as general manager in your "place, so that you will make over charge "to him.' I do not remember the date of "the letter, but it was in the beginning of "this month of January that I received it. "I did not receive any other notice than "the one I mentioned, and since that I "received several other notices to the same "effect, but previous to that I did not receive "any other notice at all. The assistants and "servants generally of the Bengal Coal "Company have all orders to obey Mr. Pell "as general manager, and not me."

If Mr. Kenny be believed, and if the letter of appointment be genuine, which I have no doubt that it is when it is attested by Mr. Kenny on oath, then I think that Mr. Kenny is yet the manager of the Company under that letter of appointment, if his services are dispensed with at the option of the Company, for the Company under the terms of that letter should give him three months' notice before they dispense with his services. But if he is dismissed for any general misbehaviour on his part, then it is a matter of doubt whether the terms of the letter of appointment should take effect or not, for in such a case the Company cannot at all keep Mr. Kenny in their service to the detriment of their own business. At least some of these questions were decided in the case of P. F. Hughes *vs.* The Secretary of State for India in Council, Volume VII. Bengal Law Reports, p. 688. Now I find that not a single statement is made by Mr. Pell in his written statement as to whether Mr. Kenny is dismissed for misbehaviour; and further, I find that the manner in which Mr. Kenny argues shows that his services are dispensed with at the option of the Company, for if it were otherwise he should have expressed before me that fact and should not have urged that he is entitled to a notice, *viz.*, three months' notice from the Company, before they dispense with his services. It does not appear, therefore, that he is dismissed for misbehaviour. If that is so, then I think under the letter of appointment it is optional to the Company to dispense with the services of Mr. Kenny at their pleasure provided the Company gives him three months' notice to retire. On the other hand, there is also a corresponding obligation on Mr. Kenny to leave the service at his pleasure after giving six months' notice to the Company. It must be understood here that this opinion which I have given should not bind either the Company or Mr. Kenny at all, inasmuch as I am obliged to give this opinion for the purposes of this suit, *viz.*, for this purpose whether Mr. Kenny's admission can entitle plaintiff to have a decree of his claim against the Company. Now, when I find that Mr. Kenny is yet the manager, I think his admission should bind the Company.

Irrespective of this question, if Mr. Pell's objection that plaintiff's salary is liable to forfeiture on account of his misconduct be taken into consideration, taking him to be the present manager of the Bengal Coal Company, then I think plaintiff is entitled to get his salary. It is not denied by the Company, represented either by Mr. Pell or by Mr. Kenny, that plaintiff was charged with theft on the 16th November last. Hence any salary due to him previous to that time

ıould, I think, be paid to him. Mr. Pell is ound to raise that objection under the eneral law which guides both the master nd the servant; and I entertain great doubts bout the matter whether the subsequent nisconduct of a servant can make him liable o forfeiture of his previous salary. But hen plaintiff is already punished for the ffence of theft which he committed, I think, hough I am not positively certain, plaintiff s equitably entitled to get his salary which was due to him previous to the commission of the offence. Seeing all the circumstances of this case, I order that plaintiff is entitled to a decree with costs, contingent upon the orders of the Hon'ble High Court. The sum so adjudged shall be paid by the defendant Company with interest at 6 per cent. per year from date of decree to date of payment.

The question upon which I solicit the Hon'ble High Court's opinion is whether plaintiff is entitled to get his salary, *viz.*, his previous salary, owing to his subsequent misconduct.

The judgment of the High Court was delivered as follows by—

Markby, J.—The Small Cause Court Judge having found as a matter of fact that the plaintiff is entitled to his salary, notwithstanding his subsequent misconduct, we cannot say, as a matter of law, that this finding is wrong. At the same time, if the Small Cause Court Judge's finding is based upon the view which he has taken of Mr. Kenny's position, we consider that this view is wrong. Mr. Kenny's authority to make any admission which could be binding on the Company was withdrawn when he was dismissed, whether that dismissal was or was not upon such a notice as Mr. Kenny had a right to demand.

The 31st March 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Plaint—Written Statement—Issues.

Case No. 2135 of 1873.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 23rd June 1873, affirming a decision of the Moonsiff of Nimal, dated the 9th March 1872.

Soonder Narain Pandah (Plaintiff), *Appellant,*

versus

Shaikh Namdar (one of the Defendants), *Respondent.*

Baboos Rash Beharee Ghose and *Juggut Chunder Banerjee* for Appellant.

Baboo Tarucknath Sen for Respondent.

A defendant is not precluded from setting up a defence which does not appear in his written statement where the plaint does not set forth the true facts.

Markby, J.—The ground of the plaintiff's suit in this case, as stated by the Court of first instance, is that the first defendant mortgaged the land claimed to him in Bhadro 1273 for a term of ten years, and that whilst the plaintiff ploughed the land in dispute together with other lands in Assar 1274, the defendant No. 2, in collusion with the defendant No. 1, forcibly sowed it with paddy, and then reaped the harvest, and so the plaintiff was deprived of the land in question. The defendant No. 1 did not take any part in this suit. But the defendant No. 2 denied that the land which was mortgaged to the plaintiff covers the land which is now claimed by him. The issues raised were whether the deed of mortgage (that is, the mortgage to the plaintiff) was genuine; if it be so, was the plaintiff entitled to recover possession of the land claimed; and whether the plaintiff was dispossessed of the land; if so, what damages he is entitled to? Now the first Court found (and that finding is confirmed by the Court of Appeal) that the land was originally mortgaged to the defendant No. 2 prior to any mortgage to the plaintiff; and that this defendant was in possession of it until the month of Magh 1273. The Court then goes on to say: "But as the debt due "to the defendant No. 2 was not liquidated by "that time, the mortgagors made a settlement "with him in the month of Bysack of that "year to the effect that he, the mortgagee, "should continue in possession as before until "the debt is satisfied." Subsequent to that the mortgage to the plaintiff was made; and the Court also found that the defendant No. 2 has been continuously in possession ever since; therefore negativing that part of the plaintiff's allegation which states that he had been in possession and then forcibly dispossessed.

It is, therefore, in effect found that the plaintiff obtained his mortgage at the time

when there was a valid and subsisting mortgage to the defendant No. 2; and it appears to us that upon that finding the suit was rightly dismissed without going any further, unless the plaintiff could show that the mortgage to the defendant, which was a valid mortgage, had been satisfied; and this not having been done, the plaintiff would not be entitled to recover the property under his mortgage.

The only question that could be raised, and has been raised in this appeal, is whether or no the parties were in any way injured by the mode in which the facts were investigated in the Court below. Now, of course, if the matter was so conducted that the plaintiff had no opportunity of giving his evidence upon the point whether or no the defendant's mortgage was in existence, that would no doubt be a good ground of special appeal. But we think it is clear from the passage which has been read to us from the judgment of the Court below that it was a matter of discussion before the Moonsiff as to what was the real meaning of the second issue, that is, whether the terms of it were wide enough to cover this question. Then we must presume upon that that the Moonsiff thought that this point was properly in issue, because he went on to decide it. Then when the parties got into the Court of Appeal, they did not complain that they had no opportunity of giving their evidence; all that they said was that the point now raised did not appear in the written statement. Now the written statement is not conclusive upon this matter. Under the law the Court is to enquire and ascertain upon what points the parties are at issue. The Moonsiff himself has pointed out that it is quite possible that this defence should not have been set forth in the written statement, because the plaintiff had not set out the true facts in his plaint; he had wholly ignored the fact of there being any title whatsoever on the part of the defendant No. 2. He merely set out his own title, and then said that he had got into possession of the property, and was afterwards dispossessed.

Two cases have been referred to, one in the 11th Weekly Reporter, p. 61, and the other in the 17th Weekly Reporter, p. 361, this case is quite distinguishable from either of those cases. In both those cases the issue was raised for the first time in the Court of appeal, and of course the matter stood on a different footing. The question was raised after all the evidence was closed, and was not raised in the Court of first instance which, generally speaking, is the proper Court to try all such questions of fact. We think, therefore, that we ought to decide this case quite independently of either of those two cases. I would only say, with reference to the case in the 11th Weekly Reporter, in which I took part in the decision, that it appears to me that every one of these cases must be decided upon its own facts and circumstances. The question which the Court of special appeal has to decide is whether or no the parties have been injured by the course taken in the Court below. We do not think that it was intended in that case to lay down any sort of general rule, but we only expressed our opinion in that particular case that no injustice had been done to the parties. That is all what I say here.

For these reasons we think that the special appeal must be dismissed with costs.

The 1st April 1874.

Present:

The Hon'ble E. G. Birch, *Judge.*

Encroachment—Thoroughfare—Special Damages.

Case No. 2252 of 1873.

Special Appeal from a decision passed by the First Subordinate Judge of the 24-Pergunnahs, dated the 21st June 1873, reversing a decision of the Moonsiff of Baraset, dated the 9th September 1872.

Poorobashi Pal and another (Defendants), *Appellants,*

versus

Bhoobun Chunder Dey (Plaintiff), *Respondent.*

Baboo Omur Nath Bose for Appellants.

Baboo Bhowanee Churn Dutt for Respondent.

A suit for damages was held to be justified against a defendant who encroached upon a public thoroughfare where such encroachment caused plaintiff damage and inconvenience beyond, and in excess of, what his neighbours suffered.

THE Subordinate Judge has found that the plaintiff has sustained special damage and

venience by reason of the defendants' ching upon the public thoroughfare runs between their land and the iff's house. The map shows the extent encroachment, which appears to have ded so far as to prevent the egress and of carts from and to the roads run- north and south with which this lane unicates. The Subordinate Judge finds ly one cubit has been left to the plaint- front of his house. It is contended now e first time in special appeal that the iff has no right to bring this suit, and, pport of this contention, reference is to a ruling of this Court reported in 445 of 11 Weekly Reporter. It rs to me that the circumstances of ase and the case before me are very ent. The Subordinate Judge has d that the defendants are new comers; the land which they have taken had an rd upon it; and that they have removed ence from its original site to the middle e roadway just opposite to plaintiff's e, thereby causing him particular incon- nce. The Subordinate Judge has dingly decreed the plaintiff's suit, and red that the disputed pathway must be ed to its original breadth by the removal e defendants' fence. With this finding the facts of the case I am not prepared y that there is any error in law in the dinate Judge's decision. I understand ubordinate Judge to have found that laintiff has suffered damage and incon- ce beyond, and in excess of, what other le, his neighbours, have suffered, and this g so, I think that his decision is correct. special appeal is dismissed with costs.

The 2nd April 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

e of Civil Procedure, s. 246—Want of Evidence—Default by Claimant.

Case No. 2413 of 1873.

cial Appeal from a decision passed by he Judge of Midnapore, dated the 25th July 1873, reversing a decision of the Moonsiff of that District, dated the 20th July 1872.

eemunto Hajrah (one of the Defendants), *Appellant,*

versus

yud Tajooddeen and another (Plaintiffs), *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

Moonshee Mahomed Yusuf for Respondents.

Where the Court disallows a claim to attached property by reason of the claimant not having given any evidence in support, the order is one under Act VIII. of 1859, s. 246.

If a claimant in such a case is not present when it is his duty to appear and give evidence, the only thing the Court can do is to make an order under that section disallowing his claim.

Markby, J.—In this case the District Judge appears to have acted upon the decision reported in the 8th Bengal Law Reports, p. 39.* But, since the judgment of the District Judge was given, that decision has been explained by Mr. Justice Mitter in a case reported in the 20th Weekly Reporter, p. 345. We are perfectly content to adopt the reasoning used by Mr. Justice Mitter in that case. We think he rightly points out that the case in the Bengal Law Reports really was not a case in which there was an order under section 246 of the Civil Procedure Code, and that reading this section in connection with the Full Bench decision in the 11 Weekly Reporter, Full Bench Rulings, p. 8, it must be held that, where the Court disallows the claim by reason of the claimant not having given any evidence in support of his claim, that is an order under section 246. The only distinction that has been pointed out between that case and this is that here the claimant was not present, when the order disallowing his claim was passed. Now, if it was his duty to appear and give evidence in support of his claim, and he did not do so, we think that the only thing which the Court could do was to make an order under that section disallowing his claim. That is the ground of the Full Bench decision. If the claimant does not give proper evidence, then an order is to be made against him under section 246.

On this ground we think that the decision of the District Judge is wrong, and must be reversed, and the first Court's decision restored. The appellant is entitled to the costs of this appeal and of the Lower Appellate Court.

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* 16 W. R. 22.

The 2nd April 1874.

Present :

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Settlement Officers—Enhancement of Rent.

Case No. 1563 of 1873.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 27th March 1873, affirming a decision of the Sudder Moonsiff of that District, dated the 27th September 1872.

J. W. Ledlie and others, carrying on business under the style and title of Messrs. R. Watson & Co. (Plaintiffs), *Appellants,*

versus

Sreemutty Doorga Monee Dossee (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Appellants.

Baboo Jadub Chunder Seal for Respondent.

A Settlement Officer is bound to record in the jummabundee the existing rights of cultivators, and cannot impose an enhanced rent without notice on those entitled. If he enters a higher rate in spite of protest, such entry does not conclude the tenant from pleading non-liability.

Birch, J.—Both the lower Courts have found that Kenaram had no authority to sign the jummabundee on his wife's behalf, and this is a finding of fact not assailable in special appeal. Both Courts have also found that the entry in the jummabundee raised the rent from Rs. 20 to Rs. 53-9-2. These findings amount to this that the Settlement Deputy Collector arbitrarily raised the rent of the tenant, although he was not authorized so to do, and entered in the jummabundee this arbitrary rate. A Settlement Officer is bound to record in the jummabundee the existing rights of cultivators, and he cannot impose an enhanced rent without causing a notice to be served on those entitled to notice. If he acts in contravention of the law, and enters in a jummabundee a higher rate of rent than the tenant admits to have paid in previous years, and does so, as has been found in this case, in spite of a protest on the part of the tenant, such entry does not conclude the tenant from showing when he is sued for rent that the jummabundee does not correctly represent the conditions of his tenure, and that he is not liable for the rent therein recorded, the correctness of which he has never admitted. What the Judge has substantially found is this, that the Deputy Collector had no right to increase the rent of the tenure without due notice, and that the tenant is not bound by the entry the Deputy Collector improperly and illegally made in the jummabundee. We cannot say that the Judge in so holding has taken an erroneous view of the law.

The special appeal must be dismissed with costs.

Markby, J.—I concur.

The 8th April 1874.

Present :

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Limitation — Execution — Act IX. of 1871, Sch. II., art. 167.

Case No. 391 of 1873.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 6th September 1873, affirming an order of the Second Subordinate Judge of that District, dated the 5th July 1873.

Prokash Chunder Lahory and others (Decree-holders), *Appellants,*

versus

Poorno Chunder Roy and others (Judgment-debtors), *Respondents.*

Mr. C. Jackson and *Baboo Shushee Bhoosun Dutt* for Appellants.

Mr. R. T. Allan and *Baboos Ashootosh Mookerjee* and *Tarucknath Dutt* for Respondents.

The term "Court" in Act IX. of 1871, Sch. II., art. 167, means the Court whose business it is, either by transfer or otherwise, to execute the decree.

Jackson, J.—This was a case of execution of a decree of the Moorshedabad Court transferred by a certificate under section 284 and the following sections to the District Court of the 24-Pergunnahs. Certain proceedings in execution were taken in that Court ending in a sale of the judgment-debtor's property on the 7th May 1869. That sale was confirmed on the 10th June, and the proceeds of the sale were paid to the decree-holder on the 1st July 1869. On the 1st June 1872, by

be a representative of the decree-holder ade an application in the Court of the cond Subordinate Judge of 24-Pergunnahs revive the execution. It does not seem have occurred to anybody for a whole onth that this application was made to a ong Court, but on the 1st July the itioner brought to the notice of the Court at there was a mistake. An application is made to the Judge of the district on the th July to remove the application, but no der was made thereupon, and on the 26th ly an application *de novo* was made to the istrict Judge for execution. Thereupon otice was issued under section 216, and e judgment-debtor objected, it would seem, n the ground of limitation. The Judge did ot dispose of the objection, but referred the hole matter on the 4th September to the ubordinate Judge. No decision appears o have been come to, for on the 4th April 873 the case was struck off for default of he decree-holder. Fresh life appears to have een infused into him by that striking off, or on the 8th April he came forward again nd applied for a revival of the case, and the ebtor again pleaded limitation. On that he Subordinate Judge held that the applica- ion is barred, and that decision has been ffirmed by the District Judge. There are other objections to the present application, but it seems to us that it is unnecessary to go beyond the single one that the application is out of time. This case must be disposed of under Act IX. of 1871, and by the 167th clause of the second Schedule of that Act it is clear that the period of limitation for execution of a decree not provided for is three years, which period begins to rule in this case from the date of applying to the Court to enforce or keep in force the decree or order. Now the objection of limitation as raised in this matter was not then decided upon the application of the 22nd July 1872, and we must therefore deal with it as if we were in fact deciding upon that application. It is clear that more than three years had elapsed from the date of applying to the Court to enforce the decree. The "Court" clearly means the Court whose business it was, either by transfer or otherwise, to execute the decree. It could not certainly be meant that the decree-holder should be at liberty to apply to any Court he thought fit, and this execution could not be applied for in the Court of the Subordinate Judge or in any Court in 24-Pergunnahs other than the Court and could not be afterwards revived. We think the special appeal therefore fails, and must be dismissed with costs—4 gold mohurs.

The 8th April 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Privy Council Appeal—Costs—Interest.

Case No. 178 of 1873.

Miscellaneous Appeal from an order passed by the Officiating Subordinate Judge of Moorshedabad, dated the 17th February 1873.

Nil Madhub Doss (Decree-holder), *Appellant,*

versus

Bissumbhur Doss and others (Judgment-debtors), *Respondents.*

Baboo Kashee Kant Sen for Appellant.

No one for Respondents.

Where an order of Council in England awarded costs incurred in this country, including charges for translation and printing, HELD that the costs should carry interest at 6 per cent.

Jackson, J.—We think the matter is quite clear. The costs taxed by the Registrar in England are evidently costs incurred in England, which are incurred in English currency; and manifestly the order in Council that the appellant should recover from the respondent the costs of the proceedings in the Court below has reference to the costs incurred in this country, which would include the costs for translating and printing the records previous to their despatch in England. We think these costs should carry interest at 6 per cent. per annum. We make no order as to interest on costs taxed in England.

There will be no order as to costs in this appeal.

G.

Therefore that case proceeded upon a different ground. This suit is cognizable by the Small Cause Court as a suit to recover personal property, and therefore under section 27, Act XXIII of 1861, we have no jurisdiction to hear the special appeal.

The appeal must, therefore, be dismissed with costs.

The 9th April 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Evidence Act (I. of 1872), s. 33—Admissions.

Case No. 859 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 1st March 1873, reversing a decision of the Sudder Moonsiff of that District, dated the 1st October 1872.

Soojan Bibee and another (Plaintiffs), *Appellants*,

versus

Achmut Ali and others (Defendants), *Respondents*.

Baboo Umbica Churn Bose for Appellants.

Baboo Grish Chunder Ghose for Respondents.

Section 33 of the Evidence Act does not apply to the deposition of a witness in a former suit which is sought to be used against him in a subsequent suit in which he is a defendant, not as evidence between the parties, but as an admission against himself.

Couch, C.J.—THE Judge in his judgment on the appeal says that the plaintiffs sued to obtain possession of 6 kanees 2 cowries 2 krants of land, being a one-third of nine plots, and alleged that the whole of the nine plots belonged to their mother, Bejan Bibee, who died in 1231; that she received these lands by gift under an hibbanama, dated the 7th Kartick 1212, from her husband Nur Mahomed; and that the plaintiffs were her two daughters, and the defendants her two sons. He states that the defendant Arman Bibee pleaded to the same effect as another defendant had, namely, that the hibbanama was a fraudulent instrument, and that Bejan Bibee never held possession under it; and that Achmut Ali set up the same defence, and a purchaser from Arman Bibee did so also, they being the appellants before the Judge.

He then says correctly that it lay upon the plaintiffs to prove that they, or their mother Bejan Bibee, had exercised possession in all the nine parcels at some time within twelve years before the suit; to prove the hibbanama; and to prove that Nur Mahomed had a good title to the lands specified above and was in possession of them at the date of the hibbanama. He then states what evidence there was for the plaintiff, namely, three witnesses and five documents, and he appears to consider that the evidence of the three witnesses was of no value.

Then he says: "Turning now to the documents, the hibbanama, or the writing or signature or execution thereof, has not been proved by any evidence whatever. The fact that the hibbanama was then (in the former suit) used and asserted may be some evidence, but its weight is very small, and that the defendants in that suit were not in privity with the present defendants, who were no parties to the former suit.

Now, in this case, there was in evidence a deposition made by Achmut Ali in the former suit, in which he said that the hibbanama was executed and that Bejan Bibee was in possession under it at a time which is within twelve years of the institution of the present suit. There was also the bill of sale to Arman Bibee from Achmut Ali in which the hibbanama was mentioned; this having been executed after the death of Bejan Bibee, and, apparently, being founded upon the state of things stated in it, *viz.*, that the property had been given to Bejan Bibee, and after her death had descended to the two sons and two daughters.

The deposition of Achmut Ali was evidence against himself; it was also evidence against Arman Bibee, who claimed under him, and against the other appellant who had purchased from Arman Bibee, and who in fact claimed under both. The statement in the bill of sale was also evidence against them, because it was the statement of both the parties to it, of Achmut Ali, the seller, and of Arman Bibee, the purchaser. It would also be evidence against the person who purchased from her. The Judge, therefore, when he says that the hibbanama has not been proved by any evidence, appears to have entirely overlooked this part of the case, and not to have had present to his mind that this deposition and the recital in the bill of sale were good proof of the hibbanama, unless met by evidence on the part

the defendant sufficiently strong to prove at what the plaintiff alleged was not the e state of things.

The Judge then speaks of the depositions d this is the only way in which he refers the deposition of Achmut Ali) and says: The other two documents, copies of the deposition of Hyder Ali and Achmut Ali, two persons on all hands admitted to be alive, are wholly inadmissible, as it is not shown that these persons are dead or cannot be found, or are incapable of giving evidence. Further, the depositions in question were not given in proceedings between the same parties." He appears to have overlooked that section 33 does not apply to e deposition of a witness in a former suit en the witness is himself a defendant in e subsequent suit, and the deposition is ught to be used against him, not as evidence ven between the parties one of whom lled him as a witness, but as a statement ade by him, which would be evidence ainst him whether he made it as a witness on any other occasion. It is used against m as an admission. Section 33 has no pplication to such a case as the present. he sections of the Evidence Act which do pply are the sections relating to admissions. he not considering the deposition of chmut Ali as an admission was a mistake. s to the deposition of the other witness, e Judge is right. Although Hyder Ali is ead, this is not a suit between the same parties, and his evidence in the former suit would not be evidence in this.

Then the Judge says: "The hibbanama "is not proved, and I am also of opinion that "there is no proof that the plaintiffs or their "mother under whom they claim were in "possession within twelve years before suit." Here he altogether ignores the statement which Achmut Ali had made, in which he distinctly said that Bejan Bibee was in possession within twelve years. No doubt his doing this is explained by the way in which he overlooked the effect which ought to be given to the deposition of Achmut Ali. He appears to us to have altogether disregarded what was very cogent evidence in the case, the admissions made by the parties, apparently deliberately, and which were not to be set aside merely upon the suggestion or statement made by the same persons that the facts were different from what on the former occasion they stated them to be. It might have been shown, if it were so, that this deposition was false, and that the statement in the bill of sale was false; but it would require strong evidence to prove that what the parties had deliberately asserted was altogether untrue, they alleging the facts to be different in order to keep the property which they were in possession of.

We think we ought not to remand this case to be tried by another Judge, for the evidence appears to be all one way. The evidence of the plaintiffs does not appear to have been met by any evidence on the part of the defendants, and it would be an idle proceeding to send the case down to the lower Court when, if it found contrary to such evidence as this in favour of the defendant, we should have to reverse the finding on appeal. The decree of the Lower Appellate Court must be reversed, and the decree of the first Court, the judgment of which appears to be a proper one, will remain. The appellant will have the costs in this Court and in the Lower Appellate Court.

The 10th April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Trustee—Limitation—Act XIV. of 1859, s. 2.

Case No. 1617 of 1873.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 7th June 1873, affirming a decision of the Subordinate Judge of that District, dated the 7th May 1873.

Syud Shah Alleh Ahmed (Defendant), *Appellant,*

versus

Mussamut Bibee Nuseebun (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Moulvie Syud Murhumut Hossein* for Appellant.

Messrs. C. Gregory and *M. L. Sandel* and *Baboo Chunder Madhub Ghose* for Respondent.

Where property is vested in a person partly for charitable purposes and partly for the benefit of others, and he is bound to use it for such purposes and not for his own advantage, he is a trustee within the meaning of Act XIV. of 1859, s. 2.

Phear, J.—We think that the special appellant is entitled to succeed on the last of his objections, namely, his objection to the decree for Rs. 12,000 and odd. The Lower Appellate Court has not taken the proper course in this case. The defendant having been held bound to account, proper steps ought to have been taken for the purpose of taking that account from the defendant. We must reverse the decision and send back the case in order that proper accounts may be taken.

Two other objections were made, first, that the defendant is not properly a trustee within the meaning of the Limitation Act; and that consequently the plaintiff's claim is barred, or at any rate it must be limited either to a period of three years or six years.

And a case reported in 13 Moore's Indian Appeals has been cited to us in support of this objection. But it appears to us that that case is not in point. There the sebayet of a Hindoo idol was held not to be a trustee of the property. And as far as that case goes, it merely affirms a doctrine which has always been held in this Court, that an idol itself under Hindoo Law is a person capable of holding and enjoying property, and that the sebayet is merely the manager for the time being of that property, and not the proprietor. Here, however, it would seem that the defendant has necessarily some property in the subject of suit which is dedicated first to certain charitable purposes, and then the remainder is to go to the plaintiff and other persons. There is no other person in whom the property can reside unless it be the defendant; and he is bound to use such property as he has in it, not for his own advantage, but for the purposes of carrying out the trusts of the deed under which he took it. He would therefore appear to be a trustee within the meaning of the 2nd section of Act XIV. of 1859. Then that section enacts that no suit against a trustee in his lifetime shall be barred by any length of time. In this view of the case both the two first objections of the special appellant fall to the ground. The plaintiff is entitled to call upon the defendant as a trustee for an account; and as it does not appear that any accounts have been settled between the trustee and the plaintiff, or any predecessor of the plaintiff, the account must be taken from the period mentioned in the plaint.

We think the respondent must get his costs of this appeal.

The 10th April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Maps or Evidence sent for by Court—Code of Civil Procedure, s. 355.

Case No. 306 of 1873.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 21st October 1872, affirming a decision of the Sudder Moonsiff of Arrah, dated the 20th July 1872.

Gunput Roy and others (Plaintiffs), *Appellants,*

versus

Ram Deour Roy (one of the Defendants), *Respondent.*

Mr. M. L. Sandel for Appellants.

Mr. R. E. Twidale and *Baboo Mohesh Chunder Chowdhry* for Respondent.

When a Judge sends for a map or other evidence, he is bound to record his reason for doing so, according to the provisions of the Code of Civil Procedure, and the evidence so obtained must be taken and received by him in the presence of the parties in open Court and afterwards kept on the record. It is not competent to him under s. 355 merely of his own discretion to send for a document for personal inspection irrespective of the parties to the suit.

Phear, J.—It is with extreme regret that we feel ourselves obliged to reverse the decision of the Lower Appellate Court and to send back his case once more for re-trial. The Judge says: "From the Ameen's map "prepared in 1870, as well as the map drawn "by the Moonsiff in his local investigation "now under appeal, it is clear that the land "in suit must have been in the bed of the "Ganges in 1264 to 1268, *i. e.*, that the deep "channel of the Ganges ran in that spot "and over the length of that during that "period, and must then have taken some time "to fill up."

This conclusion of fact is so entirely opposed to the case of the plaintiff and contradictory to the testimony of his witness that the Judge, having once adopted it, had no other alternative but to discredit the plaintiff's case altogether and dismiss his suit. And this is in effect the course which the Judge has taken. But so far as we comprehend the reasons on which the Judge arrived at this conclusion of fact, we think

hich has been had in the Lower Appellate ourt has been a miscarriage. The Judge ives his reasons, to which we just referred, s follows :—

"In the late Chukey Nowringha and Bahoorunpore cases elaborate maps were prepared; and for the purposes of this suit the map of Bahoorunpore was sent for from the serishta."

Now no ground is suggested to us upon hich this Bahoorunpore map could be ightly sent for by the Judge and used as vidence between the parties in this case vithout their consent. The Judge has not, as he was bound under the Civil Procedure Code to do, recorded the grounds upon which he sent for this map. And we have no means whatever of judging as to its relevancy or admissibility in this case. It is of course quite possible that the map may have been made on such an authority and may have such a character that it can be rightly used as evidence between the parties to this suit. But whether this is so or not we are unable to form any opinion.

The Judge then goes on to say: "I find the map of the Ameen of 1870, of the Moonsiff of 1872, agree entirely as to the course of the river-bed of 1264 to 1268 F.S." This statement is not very easy to be understood, because it is obvious that neither the map of the Ameen which was made in 1870, nor that which was made by the Moonsiff's directions in 1872, could afford evidence of the course of the river-bed at any time between the years 1264 and 1268.

The Judge next says: "On the Ameen's "map of 1870, I have put two lines in blue, "marked 1844, 1839, showing roughly the "position of the Ganges at that date, as also "a third blue line 1264-5. And the fourth "double blue line, the continuation of the "Southern Bhagur or river-bed of 1263-4. "Thus there are five distinct positions of the "deep bed of the Ganges between 1839 "and 1860."

But the Judge gives us no information as to the mode in which he ascertained the course of the Ganges in these different years for the purpose of setting it out in blue lines upon the Ameen's map. It has been suggested to us as possible that the Judge may have had before him the survey maps of those dates respectively. But no such maps appear upon the record, and the Judge himself has nowhere given us any means by which we could discover the evidence upon

Then he says: "By a glance at the map," by which we suppose he means the map with the course of the river set out in blue lines, "it is apparent that the disputed "land is part of the bed of the river of 1264 "to 1268. And that therefore during the time "the river ran in that course no one could "have been in possession as kashtkar." But in the immediately following passage of the judgment he says: "Between 1844 to 1268 "or 1860 there is no certainty where the "river was, except that it lay somewhere "between those two lines, *i.e.*, river of 1244 "and river of 1264 to 1268."

Thus itse ems that the conclusions of fact at which the Judge arrived in the form in which he has expressed them in his judgment had no foundation in the evidence which is on the record. And even if he is right in the view which he has taken as to the course of the river Ganges in the different years mentioned, it is still a presumption merely, and a presumption which does not seem to arise naturally out of the facts, that at some time or other between the extreme dates the course of the river must have gone over the portion of the land which the plaintiff claims. That the Judge has been influenced in regard to the decision which he has passed mainly by the conclusion of fact at which he has thus arrived, appears from the next following passage of his judgment. He proceeds to say: "It is self-evident, "therefore, that though plaintiff's witnesses, "who include the Maharajah's tehsildar for "thirty years, a putwaree, and neighbouring "kashtkars, the evidence to the fact of "plaintiff's land never having been cut away "must be false, and therefore that he cannot "have been in continued occupancy-right for "twelve years preceding suit; and when one "finds that such evidence fails, I cannot con-"sider it good as evidence to dispossession "on these grounds alone. I would now dis-"miss plaintiff's suit, *1st*, as his proof of "dispossession is not credible; *2nd*, as it is "clear he had no tenure for twelve years "preceding suit in the land in suit, and thus "his ground of claim falls to the ground; for, "if the evidence of his witnesses to those "points is proved unworthy of credit, I can "see no ground for believing them when they "state that they held the land in 1276."

Under these circumstances, we feel ourselves obliged, as we have already stated, to reverse the decision of the Lower Appellate Court, and to remand this case to that Court for

re-trial. If the Judge on re-trial should see reason for sending for any evidence, he will record his reasons according to the provisions of the Civil Procedure Code. And he will bear in mind that the evidence which he may send for and obtain in that way must be taken and received by him in the presence of the parties in open Court, and afterwards kept on the record. It is not competent to a Judge under section 355 of the Civil Procedure Code merely of his own discretion to send for a document for his own personal inspection irrespective of the parties to the suit. And it is above all incumbent upon him to take care that all the materials which he has used as evidence for the purpose of forming a judicial opinion in the case should be placed and remain upon the record.

Costs to abide the event.

The 13th April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act XIV. of 1859, s. 20—Bona-fide Proceeding—Execution.

Case No. 3 of 1874.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 5th December 1873, reversing an order of the Subordinate Judge of that District, dated the 5th July 1873.

Gossain Gopal Dutt Pundit (Decree-holder), *Appellant,*

versus

The Court of Wards on behalf of Shewa Sunkur Pershad, minor (Judgment-debtor), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboos Unnoda Pershad Banerjee and *Juggadanund Mookerjee* for Respondent.

An application for execution may be considered a *bonâ-fide* proceeding within the meaning of Act XIV. of 1859, s. 20, even though it proves to be fruitless, and is not followed up by any immediate step.

Phear, J.—We are of opinion that even if Act XIV. of 1859 be the Act which governs the limitation in cases like the present, still the judgment of the Lower Appellate Court is erroneous. If the application which was made by the judgment-creditor on the 21st September 1870 was a *bonâ-fide* application for execution, then clearly the present application is within time. Now the Subordinate Judge was of opinion upon the facts proved before him, that this application was a *bonâ-fide*, a real application; and there is nothing in the law enacted by Act XIV. of 1859 which should prevent an application for execution, even though it proved to be fruitless and was not followed up by any immediate step, from being considered a real *bonâ-fide* proceeding within the meaning of section 20, Act XIV. of 1859. The Judge says: "The record shows the execution "case was struck off the file on the 30th "June 1869. On the 21st September 1870 "a petition for fresh execution was presented "but the decree-holder took no further "steps, and this proceeding alone was in- "sufficient to keep the decree alive."

There is nothing, as we understand the law, which will prevent that proceeding alone from being sufficient to keep the decree alive. The first Court has come to the conclusion that that proceeding was a *bonâ-fide* proceeding; and the Appellate Court does not state any reason for thinking the contrary. Here, on special appeal, we have no ground for supposing that the decision of the Subordinate Judge was wrong on this point. If then that application for execution was a *bonâ-fide* proceeding within the meaning of section 20, Act XIV. of 1859, the present application for execution must be within time. We think, therefore, the Judge's order is wrong, and must be reversed with costs.

The 13th April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Construction of Decree—Limitation.

Case No. 389 of 1873.

Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 7th August 1873, affirming an order of the Subordinate Judge of that District, dated the 30th November 1872.

Bundhoo Singh and others (Decree-holders), *Appellants,*

versus

Lalla Seeta Ram and another (Judgment-debtors), *Respondents.*

Baboos Bhowanee Churn Dutt, Nil Madhub Sen, and *Boodh Sen Singh* for Appellants.

Mr. C. Gregory for Respondents.

Where a judgment-debtor had not yet paid up the amount due from him under a decree even with the limited interpretation that the lower Courts erroneously had put upon it, and was in no way prejudiced by a delay on the part of the judgment-creditor in appealing against such erroneous construction, the High Court in special appeal interfered to correct the mistake where in other circumstances the appeal might have been too late.

Phear, J.—We think that the Judge is wrong in his interpretation of the decree. By that decree Seeta Ram and Ram Sahoy were jointly made liable to pay costs to the judgment-creditor.

It has been argued before us that the mistake in regard to the construction of the decree was made by the Lower Appellate Court so far back as the 22nd November 1871, inasmuch as in an appeal in the very matter of this execution preferred to that Court at that time, an order was made to the effect that the judgment-debtors were only liable to pay in moieties; and the judgment-creditor did not appeal against that order. We are asked, therefore, to consider the present appeal as coming too late, and on that ground to dismiss it. If it had appeared to us that the judgment-debtor Seeta Ram had been in any way prejudiced by reason of the judgment-creditor not having appealed against the order of November 1871, we might have thought that fact a good ground for abstaining from interfering with the decision of the lower Courts now. But we find that Seeta Ram has not yet paid up the amount which is due from him under the decree; even with the limited interpretation which the lower Courts have put upon it, he has not paid his moiety of mesne-profits and costs. Under these circumstances, we do not think that we ought to prevent the special appellant from having the benefit of the proper interpretation of the decree about which we have no doubt. The orders of both the lower Courts must therefore be reversed, and the special appellant must have his costs in both these Courts.

One gold mohur is allowed for pleader's fees.

The 13th April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Execution—Decree-holder's Judgment-creditor.

Case No. 337 of 1873.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Patna, dated the 11th September 1873.

Reazut Hossein Khan *alias* Kummun Khan (Judgment-debtor), *Appellant,*

versus

Juggunnath Singh (Decree-holder), *Respondent.*

Mr. R. E. Twidale and *Moonshee Mahomed Yusuf* for Appellant.

Baboo Boodh Sen Singh for Respondent.

The judgment-creditor of a decree-holder is not warranted by the Code of Civil Procedure to call upon the Court to execute his judgment-debtor's decree as if he himself were the decree-holder.

Phear, J.—We think that the proceedings in this execution-case are irregular, and that the order of the Subordinate Judge is wrong.

The decree which Juggunnath Singh, the petitioner, seeks to get executed, is a decree which one Afzul obtained against Kummun Khan for a sum of Rs. 900 odd on the 11th January 1872. Now, under the Civil Procedure Code, there are two modes in which a person who is not himself the judgment-creditor can rightly call upon the Court to execute the decree as if he were the judgment-creditor. The first is the case in which he may have obtained an assignment of the decree either by lawful sale, or transfer, or by operation of law. And the other is where he has been appointed by the Court under section 243 a manager in another suit wherein this judgment-creditor is judgment-debtor for the purpose of getting in the debts due to the judgment-debtor in this suit, and this particular decree constitutes one of those debts. In such a case, by virtue of his appointment under section 243, he would have authority to sue out execution for the purpose of getting in or realizing the judgment-debt; in other words, to take steps in execution-proceedings for the purpose of getting the debt realized. Now in the present case Juggunnath Singh has not obtained authority to execute this decree, which

Afzul obtained against Kummun Khan, in either of these ways. He is himself a judgment-creditor of Afzul by reason of the decree which he obtained in his favour to the amount of Rs. 544 in February 1873. And it is by way of obtaining satisfaction of that decree that he has petitioned the Court of the Subordinate Judge to allow him to execute the decree which Afzul obtained against Kummun Khan in January 1872. It seems to us, therefore, that the proceedings which have been taken in this matter are altogether irregular.

But further than this, we think that the case set up by Kummun Khan affords a good answer to Juggunnath's application for execution of the decree of 1872. His answer is shortly this : * * * * * * * * * * *

We think, therefore, not only, as we have said already, that these proceedings were irregular, but that the order of the Subordinate Judge is wrong on the merits. That order is therefore reversed; and the appellant here must have his costs in both the Courts. We allow two gold mohurs for pleader's fees.

The 14th April 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Presumption of uniform Rent—Act VIII. (B. C.) of 1869, s 4.

Case No. 2239 of 1873.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 17th April 1873, affirming a decision of the Moonsiff of Gurbetta, dated the 19th December 1872.

Messrs. R. Watson & Co. (Plaintiffs), *Appellants,*

versus

Nund Lall Sircar (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Appellants.

Baboo Tarucknath Dutt for Respondent.

Where a tenant showed uniform payment of rent for nineteen years, and a slight difference (two or three annas) in the rate for a long period prior thereto, he was allowed the benefit of the presumption under Act VIII. (B. C.) of 1869, s. 4.

Markby, J.—It appears to us in this case that the decision of the Lower Appellate Court ought not to be disturbed. Even supposing that there is any doubt about including the year 1277, a point upon which we express no opinion, still it is established that nineteen years prior to that the tenure had been held at an uniform rent of Rs. 27-3-14. It is also in evidence that long prior to that, namely, in the year 1240, the tenure was held at a rent of Rs. 25-11-15 and that is stated by the first Court (and we have no reason to doubt the correctness of that statement) to have been sicca rupees. Now, allowing for the difference between the two kinds of coinage, the difference between these two sums would only amount to two or three annas. Under these circumstances we think that the Courts below, quite independently of the year 1277, were justified in giving the defendant the benefit of the presumption under section 4 of Act VIII. (B.C.) of 1869.

We, therefore, dismiss the special appeal with costs.

The 14th April 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Execution—Code of Civil Procedure, ss. 210 & 212.

Case No. 41 of 1874.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Beerbhoom, dated the 9th January 1874.

Ram Runjun Chuckerbutty (Decree-holder), *Appellant,*

versus

Rajah Jowhir Jummah Khan (Judgment-debtor), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Tarucknath Sen for Respondent.

In applying under Act VIII. of 1859, s. 210, for execution of a decree, it is incumbent upon the judgment-creditor to make it quite clear how he claims the benefit of s. 210 quite independently of the particulars required by s. 212.

Markby, J.—Whether the Subordinate Judge is strictly correct in saying that this is an application to execute the bond, or kistbundee as it is called, is a matter upon which we have some doubt. It would certainly seem in one part of the application that it was the original decree which was intended to be executed. However, it has now been distinctly stated here by the vakeel for the judgment-creditor that it is not the kistbundee but the original decree which he is

desirous to execute. But even then it still seems to us that this application was rightly rejected. We think that it was incumbent upon the judgment-creditor to make it quite clear that, in executing this decree, he based his application under section 210 of the Civil Procedure Code; and quite independently of the particulars which are required by section 212, he should have made it clear, upon the face of the application, how he claimed the benefit of section 210. It seems to us that this is very much more than a matter of form; it is a matter of the very greatest importance, because the proceedings now taken may, in all probability, be the basis of an inquiry how far this present Rajah Jowhir Jummah Khan can be made liable for the debt of his ancestor. It has been contended that, in previous cases, execution has been taken out against him, and upon that he has discharged a certain portion of the decree without objection, and that therefore no such inquiry is necessary. But it appears to us that that argument does not hold good, because the very question here is whether, under section 203, he is liable to satisfy this debt. That is a question which may arise at any time, and must be separately inquired into upon each successive application for execution. Upon these grounds we think that the application for execution in this present form was rightly refused.

The appeal will be dismissed with costs.

The 15th April 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Unregistered Deeds—Act XX. of 1866.

Case No. 1975 of 1873.

Special Appeal from a decision passed by the Officiating Additional Subordinate Judge of the 24-Pergunnahs, dated the 2nd June 1873, reversing a decision of the Officiating Additional Moonsiff of Diamond Harbour, dated the 9th March 1872.

Issuree Dossee (Plaintiff), *Appellant,*

versus

Lall Beharee Holdar and another (Defendants), *Respondents.*

Baboo Ashootosh Dhur for Appellant.

Baboos Nil Madhub Sen and *Bama Churn Banerjee* for Respondents.

The principle, that a registered document of posterior date is not to prevail over an earlier unregistered deed where the transfer under such deed has been perfected by possession, was HELD not to extend to a case in which, after such possession, the claimant under the unregistered deed had been dispossessed by the opposite party.

Jackson, J.—THE plaintiff in this case sued to recover possession of land under an alleged usufructuary mortgage. It appears that the plaintiff had been previously in possession of the land under other mortgages which had been paid off, but she further got possession, she alleges, under a new mortgage which, however, was not registered, although it was a transaction which, under the terms of Act XX. of 1866, the law required to be registered. The plaintiff alleges dispossession by the defendant, who claims to be entitled to the land under a registered deed of sale from the previous owner, the plaintiff's mortgagor. This is not a suit brought on the bare ground of possession under section 15, Act XIV. of 1859, but a suit to recover possession on the plaintiff's title. The Moonsiff gave the plaintiff a decree, applying the principle laid down in the case of Selam Sheikh *vs.* Baidonath Ghatak in 3 B. L. Reports, p. 312.* In that case, and in subsequent cases, it has been held that a registered document of posterior date is not to prevail over an earlier unregistered deed where the transfer under such deed has been perfected by possession. In the present instance, the plaintiff has no possession to rely upon, for that is with the defendant who sets up a title by purchase from the late owner. The law expressly declares that the deed under which the plaintiff claims this land is one which for want of registration shall not have effect in a Court of Justice. I am not at present prepared to carry the principle laid down in 3 B. L. Reports, p. 312,* so far as to extend it to a case like the present. The plaintiff chose to abstain from registering her title-deed. She ran all the risks which that course entailed upon her. She did not choose to bring a suit under section 15, Act XIV. of 1859, but has brought this suit upon a title which, the law declares, shall not be acted upon in any Court. It appears to me, therefore, that the decision of the Lower Appellate Court is in accordance with the law, and must be affirmed with costs.

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* 12 W. R. 217.

Ainslie, J.—I concur in the judgment delivered by my learned brother, which goes clearly to show that this case cannot be governed by the decision reported in 3 B. L. Reports, in respect of which I do not wish to express any opinion.

The 16th April 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Possessory Suit—Landlord's Possession.

Case No. 2033 of 1873.

Special Appeal from a decision passed by the Additional Judge of Backergunge, dated the 30th June 1873, reversing a decision of the Sudder Moonsiff of that District, dated the 28th August 1872.

Nila Bibee (Plaintiff), *Appellant,*

versus

Sonai Bibee (Defendant), *Respondent.*

Baboo Bhyrub Chunder Doss for Appellant.

Baboo Bykuntnath Doss for Respondent.

A suit for rent having been dismissed on the ground that defendant was not plaintiff's tenant, plaintiff sued her co-sharer and the same defendant to recover khas possession:

HELD that the Court was not at liberty on such a plaint to find plaintiff entitled to possession as landlord, and so to get symbolical possession.

Jackson, J.—THE judgment of the Lower Appellate Court is scarcely intelligible, but it seems to us that the decision of the Moonsiff could not be maintained. The plaintiff, it seems, once brought a suit against the principal defendant, or the person whom the principal defendant represents, to recover rent in respect of the land of which she alleges herself to be entitled to an undivided 8-annas share. In that suit the defendant disclaimed and denied having any occupation of the land. That was so found, and the plaintiff's suit was dismissed. The plaintiff consequently sued the same defendant and her own co-sharer to recover khas possession of her alleged share. The Moonsiff found her not entitled to that, but to a symbolical possession. Now this is something entirely different from what the plaintiff asked for. The plaintiff had previously asked for rent from the defendant, and the Court determined that the defendant was not plaintiff's tenant, and accordingly the plaintiff now sought to recover immediate possession of the land. The Court was not at liberty upon such a plaint to find the plaintiff entitled to possession as landlord over the defendant, and accordingly to get symbolical or landlord's possession. We think, therefore, that the Lower Appellate Court, if it had confined itself to reversing the judgment of the Moonsiff, would have been right. We cannot follow the judgment through all the grounds which it gives, but we think the special appeal must be dismissed with costs.

The 17th April 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble E. G. Birch, *Judge.*

Admissions—Estoppel—Benamee Transaction.

Case No. 884 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 5th March 1873, modifying a decision of the Subordinate Judge of that District, dated the 25th May 1872.

Sreemutty Debia Chowdhrain (one of the Defendants), *Appellant,*

versus

Bimola Soonduree Debia (Plaintiff), *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Kalee Mohun Doss for Respondent.

Where the Lower Appellate Court did not allow a defendant in the present suit to deny the truth of admissions made by her in a former case, or to adduce evidence of her own falsehood and deceit, it was deemed to have acted in opposition to the ruling of the Privy Council in a case in which a statement previously put forward in a Court of Justice with a view to defeat the claim of the plaintiff was held to be no estoppel to the party's showing the real truth of the transaction.

Even where the object of a benamee transaction is to obtain a shield against a creditor, the parties are not precluded from showing that it was not intended that the property should pass by the instrument creating the benamee, and that, in truth, it still remained with the person who professed to part with it.

Couch, C.J.—The suit was brought by the plaintiff for registration of her name in the Collector's register in the place of Huro Kant Roy, from whom she said she had purchased the property, the subject of the suit. Her case was that Kashee Nath Roy and Joy Kishen Roy had shares of one anna eight gundas each, and that Kashee Nath Roy sold his share to Ram Keshub Roy for Rs. 8,000, and that Huro Kant and Ishan Kant succeeded to this share by right of inheritance; that Joy Kishen Roy sold his share of one anna eight gundas to Huro Kant Roy and Ishan Kant Roy for Rs. 9,000; and that Huro Kant sold sixteen gundas to the plaintiff for Rs. 5,000, by which she became the rightful owner.

The defence of Sreemutty Debia was that Ram Keshub Roy and Huro Kant Roy and Ishan Kant Roy were not in fact the purchasers, but that she, the defendant, purchased the property for herself benamee in their names, and had been in possession of it from the date of her purchase.

The Subordinate Judge held that this defence was proved. He also found that there was no consideration for the sale to the plaintiff, and dismissed the plaintiff's suit.

The Judge, on the case coming before him in appeal, modified the decision of the Subordinate Judge, and gave the plaintiff a decree for part of the property claimed. He ordered that the plaintiff's claim in regard to eight gundas of it should be dismissed.

His judgment, which is lengthy, states in that part of it, which it is material to read, that the defendant Sreemutty, the present appellant, had, in a former suit, made a statement contrary to the case which she set up in this suit. He says that, in a case which he calls the Dinagepore case, the question was whether the property belonged to Kashee Nath Roy or Huro Kant Roy and Ishan Kant Roy, and that Sreemutty Debia was a party in that case, and it was decided in her presence, and the statement that she there made, and the decision was that these persons were really the purchasers. Then, having stated the circumstances connected with this Dinagepore case, he says: "I do "not see how Sreemutty can now turn round "and say that she is the actual owner and "possessor of Kashee Nath's share, and I "am of opinion that she cannot now, in the "face of these solemn and deliberate admis-"sions, be allowed to turn round and deny "the truth." "It cannot be argued that the "admissions were not between the present "parties, but that Sreemutty and Huro Kant "and Ishan Kant combined together and "acted together in accomplishing the object "for which the benamee arrangement was "made, for these admissions were made in a "solemn and deliberate manner before a "Court of Justice, with no other object "than to induce the Court to accept and act "upon them as true and faithful statements "of facts."

"Taking, therefore, into consideration the "nature and purport of these declarations, I "think the defendant Sreemutty cannot be "allowed to adduce evidence of her own "falsehood and deceit, and, for the reasons "given above, I hold that the defendant is "precluded from offering it, and that her "own admissions are conclusive as to the "plaintiff's right and title." . . . . "It also "seems strange that Sreemutty should, if "her statements be true, have remained "silent for so long a time, especially when a "decision against her was given in the "Dinagepore case in 1857."

What is laid down by the Judge in the passage we have read is directly opposed to the judgment of the Judicial Committee of the Privy Council in Ram Surun Singh *vs.* Mussamut Pran Peary, 13 Moore's Indian Appeals, p. 551,* where, in a manner similar to what was done in this case, the parties had put forward a statement in a Court of Justice with the view of defeating the claim of a plaintiff, and in a subsequent suit it was held that it was not an estoppel, but that it was open to the defendant to show the real truth of the transaction. There, as here, the party who made the statement was the defendant seeking to keep possession of property from which the plaintiff sought to dispossess her by setting up as true the statement which had been put forward in the former suit. There is another case in the same volume in which the same doctrine was acted upon—Oodey Koowur *vs.* Mussamut Ladoo, reported at page 588.† It is unnecessary to refer to any other decisions upon this subject. The authority of the Privy Council does not require support from any other Court.

This part of the judgment is therefore clearly wrong. And it appears to us that

* 15 W. R. (P. C.) 14.
† *Ibid.* 16.

the Judge treated these declarations as so conclusive that he did not consider that any evidence, however strong it might be, of what the transaction really was, could prevail against them.

He then says: "Again, looking at the case from another point of view, namely, that the benamee conveyance in the name of Ram Keshub was executed by Sreemutty's husband, Kashee Nath, with the obvious object of defrauding his creditors—a fact which I consider fully established by the circumstances of the case and the evidence on the record—I am also of opinion that Sreemutty is precluded from alleging her own, or rather, her husband's fraud in order to invalidate his own deed. Parties executing a fictitious deed place themselves at the mercy of the person in whose favour such a conveyance is made, and cannot subsequently be allowed to raise the convenient plea of the transaction being a benamee one," for which he refers to a decision in this Court reported in 13 Weekly Reporter, pp. 87 to 90.

That decision has been, we think we may say, treated, even by one of the learned Judges who pronounced it, as not now an authority. It is contrary to other decisions in which it has been held that parties are not precluded from showing what was the real nature of the transaction, although it might have been entered into for the purpose of setting up against creditors an apparent ownership different from the real ownership.

In many of these cases, the object of a benamee transaction is to obtain what may be called a shield against a creditor; but, notwithstanding this, the parties are not precluded from showing that it was not intended that the property should pass by the instrument creating the benamee, and that, in truth, it still remained in the person who professed to part with it. We cannot, at this moment, recollect a decision of this Court in which that has been held, although we know that it has.

What we consider to be the law in this Court on the subject is in conformity with the law in England, where the decisions which appeared to be to the contrary have been questioned and are considered to have been no longer authorities. There is a decision of Lord Romilly, M. R., in Symes *vs.* Hughes, Law Reports, 9 Equity 475, in which he held that, where an assignment of property to a trustee had been made for the purpose of defeating creditors, a suit might be maintained to recover back the property. He said that, where the purpose for which the assignment was given is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object does not deprive the assignor of his right to recover the property from the assignee who had given no consideration for it. In that case the suit was brought for the benefit of creditors, but a case is referred to in it where the suit was not of that kind. And quite recently I read a judgment of Lord Westbury in Tennent *vs.* Tennent, Law Reports, 2 Scotch Appeals, page 6, in which he says that, if he had found anything to warrant the inference that the deed sought to be set aside was framed with the view or of being a shield to the father and brother against the creditors of the appellant, he would have held that it was competent to the Court, on the evidence before it, to declare that the deed was not a reality; that it had ceased to be operative; and that the maker of it should be remitted to his former position. This shows what is now the doctrine in England on this subject.

Although, no doubt, it is improper that transactions of this kind should be entered into for the purpose of defeating creditors, yet the real nature of the transaction is what is to be discovered the real rights of the parties. If the Courts were to hold that persons were concluded under such circumstances, they would be assisting in a fraud, for they would be giving an estate to a person when it was never intended that he should have it. This part of the judgment of the Judge is also wrong.

It appears from the decision as to another portion of the property, that the defendant Sreemutty Debia had a good title to it; the evidence as to both parts appears to be the same. This shows the view which the Judge took of the evidence independently of the admission of Sreemutty, and that, if he had not erroneously felt himself bound to give effect to that admission, he would have decided the case in the same way as the Subordinate Judge, namely, that the title to the whole was in the defendant Sreemutty.

Under these circumstances we think we ought not to remand the case. It is apparent that the Judge has given this erroneous judgment, and has overruled the decision of the first Court, from the mistaken view which he took of the law. His decision must be reversed, and the decision of the first Court, which appears to be a correct one, will be allowed to stand. The appellant will have the costs in this Court and in the Lower Appellate Court.

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The 27th February 1874.

Present:

ames W. Colvile, Sir Barnes Peacock, r Montague E. Smith, Sir Robert P. llier, and Sir Lawrence Peel.

sor and Lessee—Presumption of Fraud.

*ppeal from the High Court of Judicature at Fort William in Bengal.**

he Administrator-General of Bengal

versus

Anundo Chunder Bose.

legal presumption of fraud having been practised from the mere fact of a lease being obtained from anager of an estate at an unusually low rate of

HIS was a suit brought by Mr. Hogg, the ministrator-General of Bengal, and joint cutor of the estate of Mr. Henry Adams, eased, and also in his capacity as attorney Mrs. Adams, the widow of Mr. Adams, nst Anundo Chunder Bose, the holder of rtain mokurruree pottah. The suit seeks to aside that pottah upon these grounds: , that it was obtained by the defendant ndo Chunder Bose, who was a naib of estate acting under Mr. Shaw, who was gent or attorney for Mrs. Adams, by collusion between the defendant and Mr. Shaw; nd, *secondly*, for the reason that Mr. Shaw ad no authority to grant any such lease. t was not a suit for reforming the lease, but imply for setting it aside; and the effect of would be to turn the defendant out of ossession, and to put the plaintiffs in it, without any recompense to the defendant of any kind for any improvements he may have made, if he made any.

The facts necessary to make the suit intelligible may be very shortly stated. Mr. Adams, the owner of a considerable tract of land in the Soonderbuns, died in the year 1845, leaving a will, made not long before his death, whereby he devised his estates to his wife for life, with remainder to her children, and appointed her and Sir Thomas Turton, who was then acting as Administrator-General of Bengal, joint executors of the will. Mrs. Adams has ever since resided in England, giving authority from time to time to various persons, to Mr. Steers, and Mr. Vos, and Mr. Shaw, at different times, in 1847, 1861, 1862, and 1868, under powers-of-attorney, to manage the estate, and collect the rents, though not in terms to grant leases. The lease in question was a mokurruree lease granted to the defendant, who was the naib of the estate, in December 1862. He obtained this lease upon the terms of paying no rent at first, but the rent to be increased until it rose to the maximum of ten annas per beegha.

It has been contended that the rate of rent in this case was lower than was usual in leases of a similar character in the neighbourhood, and that the defendant, who acted as a naib, obtained it improperly, and in collusion with Mr. Shaw.

The issues, which it is not immaterial to look at, were these: "1. Had the agents, who "used to be appointed and who were appointed on behalf of Mrs. Adams in the Soonderbun lots left to her by her husband, any "authority to make mourosee settlements? "Had the agent, Mr. Shaw, any such authority?" Then the next is: "The said agent, "Mr. Shaw, created, on the 15th Pous 1269, a "mourosee jumma in favour of the defendant; did he act collusively in settling it "at an inadequate rent, or act in a *bond-fide* "and straightforward manner?" Then the third issue is: "After taking the said land "did the defendant enhance its value?" Upon that, their Lordships understand, there is no specific finding; and that may be put out of the question. The fourth issue is: "Were Mrs. Adams and her "agents, subsequently appointed, cognizant of "the pottah granted by Mr. Shaw, or not? "Did they by their conduct confirm the "defendant's jumma, or not? If they did, "then, can the plaintiff now bring the present "action?" Those were the issues

* From the judgment of Couch, C.J., and Mitter, J., Special Appeal No. 1016 of 1871, decided on the 20th ebruary 1872—17 W. R. 301.

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The case in the first instance came before the Subordinate Judge of the 24-Pergunnahs; and their Lordships understand him to have found in favour of the defendant on the first issue: "Had the agents authority to make mourosee settlements? Had the agent, Mr. Shaw, any such authority?"

With respect to the second issue, namely, whether there was collusion between Mr. Shaw and the defendant, that case was withdrawn, and a totally different case was set up, which is not pointed to by any of these issues. The case set up—what may be called the substituted case—was, not that Mr. Shaw and the defendant colluded, but that the defendant, the under-agent, imposed upon Mr. Shaw, the superior agent, and induced Mr. Shaw to grant this lease without Mr. Shaw being aware of its contents. Now their Lordships understand the Subordinate Judge to have found that there was no misrepresentation; that the defendant did not impose upon Mr. Shaw.

With reference to the fourth issue—"Were Mrs. Adams and her agents, subsequently appointed, cognizant of the pottah "granted by Mr. Shaw, or not? Did they, "by their conduct, confirm the defendant's "jumma, or not?"—their Lordships understand the Subordinate Judge to have found that they were cognizant of it, and that they did confirm it. It appears to their Lordships that there was evidence upon which all of these findings might have been properly supported.

The case then came before Mr. Beaufort, the Judge of the 24-Pergunnahs, upon appeal to him, the case not being of sufficient magnitude and value to admit of its being taken by way of appeal to the High Court. Mr. Beaufort, as their Lordships understand his decision, did not reverse the finding in point of fact of the Subordinate Judge, that Mr. Shaw granted this lease, acting within the general scope of his authority as agent. He certainly does not find that the lease was granted without authority. Upon the fourth issue—whether or not this grant was subsequently confirmed by Mr. Shaw and Mr. Steers (who acted with him) with cognizance of the facts—there is no specific finding on the part of Mr. Beaufort; but he does not, upon that either, reverse the decision of the lower Court.

Their Lordships may observe upon this that that decision does appear to them to be, in a great degree, confirmed by an ikrar executed in 1866, whereby the former lease to the defendant, in their Lordships' view, must be taken to have been recognized, and by recognition confirmed by Mr. Steers and by Mr. Shaw; and their Lordships understand that it has been further confirmed by the receipt of rent from the defendant to the present time.

The Judge of the 24-Pergunnahs differs from the finding of the Judge of the Court below, and reverses his findings upon these grounds. With respect to the substituted issue, as to whether the defendant imposed upon Mr. Shaw, he finds that the defendant did impose upon Mr. Shaw in obtaining this lease; and he states the ground upon which he comes to that conclusion. These are his words: "As he "obtained it at an unusually low rate and at a "russudi jumma, the maximum rate of "which is this unusually low rate, I must "presume that he fraudulently misled the "manager for his own benefit." That, as far as their Lordships are able to understand it, is the ground of Mr. Beaufort's judgment.

Upon this there was a special appeal to the High Court; and the High Court in effect reversed the judgment of Mr. Beaufort, and confirmed the judgment of the Subordinate Judge, upon this ground: That Mr. Beaufort was not justified in presuming, as he appears to have done, from the mere fact that the land was let at an unusually low rent, that therefore the defendant had obtained it by a fraud practised upon Mr. Shaw.

It appears to their Lordships that the High Court were right in that view, that there was no such legal presumption; and that is the main ground, if not the only ground, upon which the High Court appear to have reversed the decision of Mr. Beaufort. They also refer to one matter which is alluded to in the grounds of appeal, namely, that Mr. Beaufort had not dealt with the question of subsequent ratification by Mr. Steers and Mr. Shaw; and their Lordships are unable to say that the remarks which have been made by the High Court on that subject are open to any substantial objection.

On these grounds their Lordships are of opinion that the High Court was justified in point of law in reversing upon special appeal the judgment of Mr. Beaufort; and consequently they think it their duty humbly to advise Her Majesty that the judgment of the High Court be affirmed, and the appeal dismissed.

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The 8th April 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge.*

Putnee Lease—Intermediate Talooks—Merger.

Case No. 770 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 10th January 1873, reversing a decision of the Moonsiff of Futtickcherree, dated the 12th September 1872.

Joora Gazee (Plaintiff), *Appellant,*

versus

Aboo Khalifa and another (Defendants), *Respondents.*

Baboo Umbika Churn Bose for Appellant.

Baboo Gopeenath Mookerjee for Respondents.

Case.—Plaintiff took from the zemindar a sudder putnee. There were some talooks in existence which were mortgaged, and the zemindar bought in the rights of the talookdars. Plaintiff then, considering that, by the doctrine of merger, the talooks had ceased to exist, brought to collect rents direct from the ryots in a suit in which the zemindar was made a party. The Lower Appellate Court held that there could be no merger, for, before the zemindar became the owner of the talooks, the sudder putnee had been created:

HELD that, as the mortgages were released after the putnee was granted, the Judge was right in law in saying that the interest did not pass under the putnee.

Couch, C.J.—We cannot say that the District Judge has been wrong in law in the decision which he has come to. It is admitted that, at the time the putnee was granted, the mortgages were in existence, and they do not seem to have been released, until after it was granted, and the money was paid. It is not likely that the plaintiff would have parted with his money before getting the putnee. If he did, it would have been stated in the documents, and that the intention was that the mortgages should be released so as to be included in the putnee.

Then, if the mortgages were not released until after the putnee was actually granted, and were satisfied by the money that was then paid, the question is whether there was an arrangement between the parties that the mortgages should be so satisfied, and should be considered as included in the putnee, an arrangement which the Court could give effect to, although the mortgages would not legally be merged in the estate. But the burden of proving that this was the arrangement was upon the plaintiff. The plaintiff, it is true, produced a petition presented by the defendant in Court for the purpose of defeating the claim of some creditor. The defendant admits he did so. But that is not conclusive against him in the present suit. It was open to the Court and proper to consider what weight ought to be given to it.

Two witnesses were called, one a mookhtear, who said that he prepared the papers, but his evidence is not supported by the ikrar which he prepared; and the evidence of the other, a cultivator, cannot be considered as worth anything, as he talks of the mortgages being released at a time when, in fact, he could have no knowledge of that description. He, no doubt, adopted the words of the mookhtear, and repeated what was suggested to him.

This being a question of fact, when the case came before the Judge, it was for him to consider whether, looking at the nature of it, the evidence was satisfactory to his mind, and such as he could find upon it in favour of the plaintiff. He seems to have considered that it was not. He does not indeed allude to the evidence in the full way in which the Moonsiff did; but he notices circumstances which might properly have considerable weight with him. He says: "The sudder "putnee lease contains no stipulation that "Aboo Khalifa was to purchase and destroy "the talooks in order to give plaintiff the "benefit of collecting from the ryots," which is a just observation, as it is to be expected if that was the intention it would be stated. He proceeds: "The plaintiff received no "*amulnama*. He did not even receive "a list of the persons who were to pay him "any rent, or any specification of what the "interests of the tenants were." This is a matter which he might fairly take into consideration. He has treated the case, in this part of it, as a question of fact, and appears to have thought that the case which the plaintiff relied upon was made out. If there was only the fact that the mortgages were released after the putnee was granted, with the money which was paid to Aboo Khalifa, the Judge is right in law in saying that the interest did not pass under the putnee.

The appeal must be dismissed with costs.

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The 13th April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Mortgaged Property—Suit for Redemption—Tender by Mortgagors.

Case No. 189 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 14th May 1873.

Ram Baksh Singh (one of the Defendants), *Appellant,*

versus

Mohunt Ram Lall Doss and others (Plaintiffs), *Respondents.*

Baboo Gopal Lall Mitter for Appellant.

Messrs. R. E. Twidale and *C. Gregory* for Respondents.

A suit for the redemption of mortgaged property cannot go on to a due determination until all the mortgagors are made parties.

A tender by one or more of several mortgagors is not such as a mortgagee is bound to accept, unless it is made conjointly by the whole of the mortgagors, or on their behalf, and with their consent.

Phear, J.—It appears in this case that the entire 16 annas of the mouzah, which is the subject of suit, was, in the year 1861, mortgaged by the owner Chowdhry Nund Coomar Singh to the first defendant Ram Baksh Singh, in the name of his son Takoor Dyal Singh, by a zur-i-peshgee ticca lease made to secure the repayment of Rs. 11,000. After this mortgage-transaction, Chowdhry Nund Coomar Singh died; and the right to redeem this property then devolved upon his two minor sons, Luchmee Dyal and Lall Beharee. Afterwards, again, Luchmee Dyal died, leaving his 8-annas share of the property subject to the mortgage to his two minor sons, Koonj Beharee and Takoor Dyal. In this state of things, the mother and guardian of the minors Koonj Beharee and Takoor Dyal sold their 8-annas share of the mouzah to the defendant Ram Baksh Singh, the mortgagee; and afterwards, again, the mother and guardian of the minor Lall Beharee sold four annas out of the remaining eight annas to all the plaintiffs; and finally she mortgaged the remaining four annas to the whole of the plaintiffs, except Bhagwat Tewaree. And thus, when the proceedings in redemption which culminated in this suit were instituted, the parties interested in the property subject to the mortgage, and the parties having together the right to redeem, were, and they still are, those persons whom we have just mentioned—that is to say, the first-named defendant and original mortgagee Ram Baksh Singh, as purchasers of eight annas of the property subject to the mortgage; all the plaintiffs as purchasers of four annas of the property subject to the mortgage; and again the plaintiffs exclusive of Bhagwat Tewaree as mortgagees from the minor Lall Beharee of the remaining four annas of the property subject to the mortgage; and the minor Lall Beharee himself as the mortgagor to the plaintiffs, with the like exception, of the same four annas.

In the year 1278, the plaintiffs being thus situated pressed, as they say, the defendant Ram Baksh Singh to take the sum of Rs. 5,500 from them in liquidation of his zur-peshgee, and to convey back to them eight annas of the property. And eventually the defendants refusing to accept this money, and indeed refusing to acknowledge the plaintiffs' right to tender it, they deposited it with one Nanhoo Lall Chowdhry, a mahajun of Mozufferpore, with notice of the deposit to Ram Baksh Singh; and relying upon this as an effective tender of the mortgage-money which Ram Baksh Singh was bound to accept, they brought the present suit for recovery from him of 8-annas share of the property with mesne-profits.

The lower Court has given a decree in their favour; that is, it has ordered that possession of the property be given up to them; and also directed that the defendant Ram Baksh Singh shall pay to them mesne-profits in respect of the period of time during which he has been holding possession since the date of the alleged tender in Assin 1279. The first thing that is apparent on the record which has come before us is the absence of the minor Lall Beharee. And it is very plain from the mention which we have made of the persons who are interested in the mortgaged property that the suit cannot go on to a due determination until this minor is made a party to the suit. And this consideration really seems to conclude the matter before us.

The great point, no doubt, upon which the matter of contest was made to turn in the Court below and before us was, whether or not the tender upon which the plaintiff relied was such a tender as Ram Baksh Singh was bound to accept, because, if he was bound to accept that tender, then his retention of the

operty beyond the date when that tender s made was wrongful, and he was rightly ade liable to pay damages in the shape of sne-profits for that time. But if, as ears to be the case, the minor son of the inal mortgagor is among those who ectively have a right to redeem, and for t reason ought to be made a party to this t, then it seems to be quite plain that the der of the mortgage-money, if the tender s made, by the plaintiffs alone and without authority or consent of the minor or of ne one qualified to bind him, was not such ender as the mortgagee was bound to accept. e omit of course to make any mention of m Baksh Singh himself as being one of e mortgagors, because if all the other ortgagors tendered to him their share of e mortgage-money, leaving out of the ten- only so much as he himself ought to bear proportion to his interest in the equity of demption, then, probably, a Court of Equity uld be bound to consider that a proper d effective tender, so far as the amount s concerned, had been made. But it ems to be fatal to the valid effect of the der that it was not made by all the persons terested in the equity of redemption, exclu- ve of Ram Baksh Singh, or on behalf of l of them. The same reason which renders necessary that all the mortgagors should e made parties to the suit which any one of em may bring for the purpose of redeem- ng the mortgaged property, leads necessarily the conclusion that a tender by one or more several mortgagors would not be good, nd would not be such a tender as a mort- gee is bound to accept, unless it were made ointly by the whole of the mortgagors, r on their behalf and with their consent. nd if there could be any doubt upon this oint, we think it is set at rest by the udgment of the Privy Council in the case f Pran Nath Roy, to be found in the Appen- ix to Mr. Justice Macpherson's book on Mortgages. There the Privy Council held hat the tender must be made with the con- ent and on behalf of all the mortgagors. Clearly the mortgagee was not bound to ccept it, unless he was reasonably satisfied hat it was so made. It might be very dangerous indeed for him to give up the property to one or more out of a number of mortgagors without having the consent of the remainder to his doing so, even though he had received an offer of the full amount of the mortgage-money remaining due to him. It seems to us that not only was the suit defective from the absence of the minor on the record, but also that the tender which the plaintiffs made of the share of the mort- gage-money remaining due to Ram Baksh Singh was not, under the circumstances of the case, such a tender as Ram Baksh Singh was bound to accept; and consequently, even if the frame of the suit could be considered as amended, the decree of the lower Court could not be supported.

We think we must dismiss the suit with costs.

The 17th April 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Act I. of 1872—Witnesses to a Document—Decree for Rent—Proof of Possession.

Case No. 931 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 28th February 1873, reversing a decision of the Moonsiff of Putneea, dated the 25th November 1872.

Abdool Ali (Plaintiff), *Appellant*,

versus

Abdoor Ruhman (Defendant), *Respondent*.

Baboo Bama Churn Banerjee for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondent.

The Evidence Act does not require the writer of a document to be examined as a witness; nor does s. 67 of that Act require the subscribing witnesses to a document to be produced.

A decree for rent is not proof of actual possession.

Couch, C.J.—The decree of the Subordinate Judge must be reversed, and the case remanded to him that the appeal may be re-heard.

Upon the first issue, which was whether the kobala was proved, he begins by remarking that "at the very first sight it appears to be suspicious; particularly the signatures in the kobala are evidently written in different ink and with different pens." This cannot be taken as a finding by him that the kobala was not proved. Then he proceeds to say: "Besides, the "evidence of the subscribing witnesses to "the said document is, under section 67 of "Act I. of 1872, required to be produced,

"but such evidence has not been produced. "As to the witnesses, namely, Romjan and "Sham, who have been examined in support "of the kobala, they are not the writers "of the deed, and at the very first sight "their names appear to have been written "in different ink and with different pens." This is the whole of his reasons for holding the kobala not to be proved. The principal reason, no doubt, was that he thought the subscribing witnesses ought to be produced, and he also seems to have thought that the writer of the document ought to be produced. In this he was clearly wrong. Section 67 of the Evidence Act does not require the subscribing witnesses to a document to be produced. Section 68 requires the attesting witnesses to be produced where the document is one which is required by law to be attested. And there is no section in the Act which requires the writer of the document to be examined as a witness. We can scarcely suppose that the Subordinate Judge, when he wrote this judgment, had read section 67. If he had at any time read it he must have forgotten what it was.

Then, as to the other issue, he seems to be also wrong. He says that the evidence of the witnesses who were examined for the plaintiff to prove his dispossession was not satisfactory; that they appeared to have given evidence from mere conjecture. Besides, the defendant produced a decision of the lower Court, dated the 28th of March 1872, in a separate case showing that the allegation of dispossession was false. He says this is shown because it is proved from that decision that the defendants were in possession of the disputed land from 1233 Mughee. He treats the decision, not merely as a decree obtained in a rent-suit which might or might not have been executed, and under which the defendant in that suit might or might not have paid what was decreed, but as actually proving the defendant was in possession. Then he says, and properly, that the plaintiff was no party to the suit, and therefore that the Moonsiff was right in holding that it was not evidence against the plaintiff.

So far he was right. It was not evidence against the plaintiff. The utmost that it could be said to be was an assertion by the plaintiff in that suit, and the defendant in this, of the right of ownership, which might be admissible, but which was not of much value unless it could be shown that the decree was executed.

Then, having said that it was no evidence against the plaintiff, he says that it may be held to be corroborative evidence, but not as evidence adverse to the plaintiff, and having said that, he proceeds to make it as adverse to the plaintiff as he could.

A judgment of this description cannot be supported. The case has been considered in an erroneous manner by the Subordinate Judge, and we must reverse his decree and remand the case for a re-trial. The costs will follow the result.

The 18th April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Reversioner—Right of Action—Declaratory Decree.

Case No. 52 of 1873.

Regular Appeal from a decision passed by the Subordinate Judge of Gya, dated the 21st December 1872.

Beharee Lall Meherwar (one of the Defendants), *Appellant,*

versus

Modho Lall Ahir Gyawal (Plaintiff) and another (Defendant), *Respondents.*

Baboos Kalee Mohun Doss and *Boodh Sen Singh* and *Moonshee Mahomed Yusuf* for Appellant.

The Advocate-General, Mr. C. Gregory, Baboos Unnoda Pershad Banerjee, Chunder Madhub Ghose, and *Aubinash Chunder Banerjee* for Respondents.

The principle that any person having rights in property, whether present or contingent, is entitled to come into a Court of equity to complain of any attempt which may be made by persons having no authority to do so, to deal with the property in a mode which may ultimately harm him in the matter of his title, is only acted upon when the mere lapse of time is of itself likely to render the plaintiff less able than he is at present to meet the difficulty, and to clear away the cloud which the attempt complained of may throw over his title.

Phear, J.—THE case of the plaintiff in this suit is shortly as follows: One Damoodur Mahto Gyawal died some years ago possessed of considerable property; and upon his decease, Luchho Dai, his widow, took that property for the estate of a Hindoo widow. Besides this widow Luchho Dai,

Damoodur Mahto left two daughters, Ranee Dai and Phoola Dai. At the time of Damoodur Mahto's death, one only of these daughters, Ranee Dai, had a son, Beharee Lall. But subsequently the other daughter, Phoola Dai, had a son, the present plaintiff, Madho Lall Ahir Gyawal; and three days after his birth she, Phoola Dai, died.

The state of things then was that Mussamut Luchho Dai was in possession of Damoodur Mahto's property for the estate of a Hindoo widow. One daughter, Ranee Dai, was alive, and also her son, the defendant Beharee Lall. The other daughter was dead, but she left a minor son, the present plaintiff. Between, however, the date of the death of Damoodur Mahto and the birth of the plaintiff, Luchho Dai, the widow in possession of the property, had executed a certain ikrarnama, which is said to have operated, or rather to have been intended to operate, to the benefit of Beharee Lall. The present suit is brought by Madho Lall Ahir, the son of the deceased daughter, after attaining his majority, to have it declared that that ikrarnama is void as against him, and ought to be cancelled. And the plaintiff also prays that the Court will give him a decree declaratory of his right by inheritance to have possession of a moiety of the estate of the late Damoodur Mahto Gyawal, after the demise of Mussamut Luchho Dai, and protective of his title from harm arising out of the deed sought to be set aside.

Beharee Lall is evidently the real defendant in this suit, and he sets up more than one matter of defence; amongst other things he says that the suit is barred by limitation; also that the plaintiff has no title to bring the suit; and, thirdly, that, even if he has, neither the plaint nor the evidence given at the trial discloses any cause of action.

The question of limitation is not very simple; and in the view which we have taken of the case, it is not necessary that we should in terms decide it.

We are of opinion that the plaintiff has no cause of action upon the facts which he adduces in support of his suit. Without, for the moment, determining any issue as to his right to sue for a decree protective of the inheritance, and assuming that, notwithstanding the existence of an intermediate heir, so to speak, in the person of Ranee Dai, one of the daughters of Damoodur Mahto (a person who, unless she dies before her mother, must succeed to the property before the plaintiff can do so), we think that the execution of the ikrarnama does not constitute such a dealing with the property as to afford a cause upon which a person in the situation of a so-called ultimate reversioner is entitled to bring a suit pending the life of the person who is rightfully enjoying the inheritance.

It is remarkable that the plaintiff does not in his plaint set out the terms of the ikrarnama. He has, however, filed a copy of it taken from the registry office. The defendant at first filed an alleged original ikrarnama, purporting to bear, on the face of it, the Registrar's stamp; and in addition to this he afterwards filed another copy taken from the registry office.

It is admitted that the copy filed by the plaintiff, which is not now upon the record, corresponds in terms with the copy which is filed by the defendant from the registry office. There is, at the same time, no doubt, a very material difference between the terms of the alleged original document first put in by the defendant, bearing the seal of the Registrar, and the copy document which came from the registry office. But, for the purposes of this suit, having regard to the fact that the plaintiff did not, as we have already remarked, set out the terms of the document in his plaint, and that he filed as his evidence of what the document was a copy from the registry office, we think we must take that copy to represent the document which the plaintiff complains of, and which he asks this Court to set aside or declare inoperative against his ultimate interests. We find a printed copy of this document in page 172 of the paper-book, and it runs in these words: "I, Mussamut "Luchho Dai, widow of Damoodur Mahto "Gyawal, deceased, inhabitant of Muhulla "Bubueghat, one of the Muhullas of Kusba "and Pergunnah Gya, Zilla Behar. "Whereas I, the declarant, and my late "husband have two daughters of the womb "of this declarant, *viz.*, one is Mussamut "Ranee Dai, and the other Mussamut Phoola "Dai, and the husband of me, the declarant, "died on the —— of the year —— by the will "of God, leaving me his heiress, so "that I have got possession of the whole "of the mouzahs of this Zilla and Zilla "Tirhoot, and the jattrees, houses, and house-"hold goods and cash and things and jewel-"lery, gems, and utensils and instruments, "silks and woollens, and slave girls and "slaves, properties of the deceased, as afore-"said, without any co-parcenary of any one. "Whereas Mussamut Phoola Dai, the "daughter of me, the declarant, has no son;

"and Mussamut Ranee Dai has her son, "Beharee Lall Mohurwar, living, so that "since I, the declarant, have no son of my "own, therefore, by the Shastras, the said "Beharee Lall Mohurwar, the grandson of "me, the declarant, is the heir of my late "husband and of me, the declarant. For "instance, Beharee Lall aforesaid does all "the work of the Gyawals from the jattrees "who came from Tirhoot and other parts of "the country, appertaining to my husband, "and I, the declarant, still, in order to comply "with the ikrar, write and give that all "the mouzahs of this Zilla and Zilla Tirhoot "and the houses and household goods, cash "and things, jewellery, precious stones, and "utensils, instruments, silks, woollens, slave-"girls, and the slaves and jattrees, especially "jattrees of Maharajah Roodra Narain Baha-"door, the Rajah of Durbhanga, and of the "Baboos, relatives, and of the caste of the "said Rajah, and others, property of my late "husband and of me, the declarant, and in "my possession and the other dues to, and "demands of, my husband and me, are all "the right of Beharee Lall Mohurwar as "aforesaid. During the life of me, the "declarant, I am in possession without the "co-shareship of any one, and will continue to "be so, so that I may be able to give "charities. After my death, Beharee Lall "Mohurwar will get possession of the "whole mouzahs of this Zilla and Zilla "Tirhoot, and of all the moveable and "immoveable properties and dues and "demands appertaining to the estate of my "late husband. No one else has the "right or demand to the same. Therefore "these few words have been written and "given as ikrarnama that it may be of "use when occasion arises."

This is the whole of the document; and it seems to us plain that it does not deal immediately with the property at all. Nearly the whole of it consists of certain statements of facts, which, we understand, were the actual facts of the case at the time when the ikrarnama was executed. There is no doubt that at that time Beharee Lall was the heir-in-reversion, expectant on the deaths of the ladies, to Damoodur Mahto, if one can rightly describe a person as heir who has such a contingent interest as Beharee Lall then had. The document only states that which was at the time quite beyond contest, namely, that Beharee Lall was then the so-called ultimate reversionary heir of Damoodur Mahto. The last statement —that "after my death, Beharee Lall "Mohurwar will get possession of the whole "mouzahs of this Zilla and Zilla Tirhoot, "and of all the moveable and immoveable "properties and dues and demands appur-"taining to the estates of my late husband" —is perhaps capable of being considered as an attempt to make a disposition of the property on the part of the lady. If it is a mere statement that he will as heir at that time get possession, of course it is entirely unimportant. But if the passage means that, because he is the ultimate reversionary heir to my husband, therefore I give him this property at my death, which, without my giving it, would go to my surviving daughter, then no doubt the document would become an instrument professing to deal with the property. But even if we take it in this light, and if we suppose that the plaintiff has his contingent interest, namely, the expectant right to succeed to the property at the death of Luchho Dai, provided Ranee Dai should die before Luchho Dai, then it is clear that the mischief, if there be any, which this document is calculated to do to the right of the plaintiff, is of such a character as will not be affected either for better or worse by lapse of time.

The learned Advocate-General placed the right of the plaintiff to succeed on the general ground furnished by the principle of equity that any person having rights in property, whether present or contingent, is entitled to come into a Court of equity to complain of any attempt, which may be made by persons having no authority to do so, to deal with the property in a mode which may ultimately harm him in the matter of his title. But the learned Advocate-General omitted to state that this principle of equity is only acted upon when the mere lapse of time is of itself likely to render the plaintiff less able to meet the difficulty, and to clear away the cloud which this dealing with the property may throw over his title, than he is at the present time. For instance, in the ordinary case with which we are familiar here, suppose an alienation is made by a widow which professes to be made for a purpose such as would authorize her to alienate the property. The evidence bearing on the question, whether that purpose is or is not the true purpose at the time of the alienation, is likely to die away or become less accessible by mere lapse of time. Therefore a Court of equity permits a person, who has an interest in the inheritance, and is entitled to defend and protect it, to come forward merely upon the prospect of

future mischief, to ask that the legality illegality of the threatening act be cided at a time when all the necessary terials are at hand and can be availed by both parties. But, here, in the case which now before us, if this document will bear the nstruction which we have just now stated, mely, that the lady professes thereby to wise or to give away this property on her ath to Beharee Lall, then it will be just as y, when the time comes on her death, for haree Lall to make use of this document; will be just as easy for the plaintiff, or any e interested, as he is now interested, in the eritance, to establish the invalidity of that position as it is at the present time. It s not depend upon evidence or materials of y sort, the force of which is likely to be akened or deteriorated by lapse of time.

No doubt, the learned Advocate-General d say that the essence of the complaint s that Luchho Dai herself denied this rument; that is, she said that although had executed it, she had been deceived into g so, and she never had intended it to what it now turns out to be. If that be , of course she would have a right to me forward herself at any time to com- ain of it. But this is not her suit. This a suit brought by the plaintiff in the cha- cter of an ultimate reversioner to have this ue, which this lady herself might raise, ied. Now, it seems to us that it is not a aterial fact, so far as concerns the plaintiff's ture interest, that Luchho Dai executed e instrument involuntarily, because the strument itself does not profess to pass an mediate interest: at the most it pretends give a remainder to Beharee Lall, or ther to give the property to Beharee Lall, on e occurrence of Luchho Dai's death. If had in terms pretended to pass the mediate interest to Beharee Lall, the case ight have been different; for, according to e apparent facts, the persons who were terested in the matter of this ikrarnama were all the persons who were at that time entitled to the property in possession and in reversion. Luchho Dai executed the document, we will say, in favour of Beharee Lall, who was at that time the nearest person entitled to accept the ultimate reversion upon the death of the disqualified holders. And both of Luchho Dai's daughters, Ranee Dai and Phoola Dai, assented to the transaction. According to some cases in this Court, on such a state of facts, *i.e.*, if the person entitled to the immediate possession, Luchho Dai, had, with the consent of her daughters, released the property and given it over to the hands of Beharee Lall, the person then entitled to accept the ultimate reversion, the gift or release would be held good ultimately against any other person who might eventually at the time of the surviving ladies' death prove to be the existing heir of Damoodur Mahto. And in such a case the present plaintiff would probably be entitled to complain that the document was fraudulently got up, or was not the real conveyance of Mussamut Luchho Dai. But this is not the character of the document as we have more than once stated; it passes nothing at the present time; the widow twice over in the course of it asserts that she has the entire enjoyment of the right of the property without co-parcenership whatever during her lifetime. And it therefore at the most amounts to a future disposition of the property which cannot depend for its validity upon the question whether Luchho Dai effected it voluntarily and intentionally or not.

On the whole, we are of opinion that this document does not constitute a cause of action upon which the person entitled to protect the inheritance can have any right to bring a suit. And for that reason alone, if for no other, we think that the suit ought to fail.

We therefore reverse the decision of the Subordinate Judge, and dismiss the suit with costs in both the Courts.

The 18th April 1874.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Contract—Specific Performance—Damages.

Case No. 1099 of 1873.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 4th March 1873, reversing a decision of the Moonsiff of Arrah, dated the 28th December 1872.

Sheo Pergah Roy and another (Defendants), *Appellants,*

versus

Injore Tewaree (Plaintiff), *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellants.

Baboo Chunder Madhub Ghose for Respondent.

Plaintiff having agreed to assign certain arrears of rent due to him to defendant for a consideration, brought this suit in which he tendered the kobala of assignment and claimed the consideration-money with interest:

HELD that plaintiff had misconceived the shape in which his suit was brought; and as his claim was purely for money, he should have sued for damages for breach of contract, especially as it was found as a fact that the subject assigned was now worthless.

HELD that, as in a former suit brought by the present defendant for specific performance of the same contract, plaintiff (who was defendant there) had resisted successfully, and without qualification he could not afterwards treat the contract as subsisting.

Phear, J.—ON the 4th of August 1871, the plaintiff in this suit, Injore Tewaree, agreed to assign certain arrears of rent due to him as an 8-anna shareholder from the tenants of a certain mouzah to the present defendant for a consideration of Rs. 801.

The kobala of assignment was drawn up and executed at the time; but it was not delivered because the consideration-money was not paid.

The plaintiff by this suit, which was filed on the 30th July 1872, tenders the kobala to the defendant and claims the Rs. 801 with interest. Substantially he calls upon the defendant to specifically perform his contract.

The first Court was of opinion that the plaintiff had no right to insist upon the performance of the contract in this manner; but the Lower Appellate Court came to the conclusion that the plaintiff was in equity entitled to claim specific performance thereof.

We think that the Lower Appellate Court was wrong on more than one ground. In the first place, it is to be observed that the claim of the plaintiff is, we may say, purely a money claim. And if it had not been that the arrears of rent assigned by the kobala might possibly be of such interest to the defendant that the defendant might on his side have, if he chose, asked for specific performance of the contract, there could be no question that a Court of equity would not entertain the plaintiff's claim. His claim being purely for money, he would, according to the principles which govern the Courts of equity in England, be left to his compensation in the shape of damages for the breach of contract.

But we further observe that the Judge finds as a fact that the subject assigned by the kobala to the defendant is now absolutely worthless; and that fact is of itself sufficient to stand in the way of a Court of equity's compelling specific performance of the contract. The case must be a very strong one indeed in which a Court of equity would see it right to compel a defendant specifically to complete a contract of sale which could by no possibility be of any value to him, and it may be affirmed that it certainly would not do so when the rights of the plaintiff would be amply vindicated by a decree for money damages. We think, then, that the suit in the shape in which it is brought is misconceived, and that it ought not to succeed.

There is another curious fact which is of some importance in this case, namely, that before the plaintiff had brought this suit, the defendant on his side had also brought a suit for specific performance of this same contract, and the present plaintiff had resisted the defendant's claim in that suit with success. It is true that the present defendant, the plaintiff in that suit, had alleged, that he had paid the whole of the consideration-money, and therefore was entitled to obtain a delivery of the kobala without any further payment on his part, and that the allegation was found against him. Still the suit which was brought was one in which, had the present plaintiff exhibited his readiness to carry out his agreement on payment of the money, the Court could have done complete justice between the parties as fully as it could in the present suit. So that the plaintiff had the opportunity in the suit which was then pending between the parties, of having the very issue tried, which he wishes to have tried now. We think that having thus without qualification resisted specific performance of the contract, he cannot afterwards treat the contract as subsisting, and is limited to a remedy in the shape of damages.

Further, we think that on the merits, as they have been disclosed by the finding of the Lower Appellate Court, the plaintiff has not made out a case upon which he ought to succeed in getting damages from the defendant. For that purpose he ought to have satisfied the Court that the contract was originally a valid and honest contract between the parties, and that the consequence of the defendant's not performing his part of the contract is, that he, the plaintiff, has suffered pecuniary loss. But inasmuch as by the nature of the case the right to recover the arrears of rent has not yet passed from the plaintiff to the defendant, and as it is not proved whether or not the plaintiff has recovered himself any of these arrears of rent as the fact now stands, to say the least of it, it is uncertain whether the plaintiff

as suffered any pecuniary damage or not. The Lower Appellate Court has mainly decided this case upon the defects which it finds in the defence set up by the defendant. But it is plain that it lies upon the plaintiff to show that he is entitled to damages under the facts as they occurred, and further to give some sort of measure of the amount of damages to which he is so entitled. We think he has totally failed on the facts, which the Lower Appellate Court has found, to make out a case of this kind.

It seems to us, therefore, that the appeal must be upheld, the decision of the Lower Appellate Court be reversed, and the plaintiff's suit dismissed with costs.

The 20th April 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Release—Attachment—Civil Procedure Code, s. 246.

Case No. 962 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 13th February 1873, reversing a decision of the Moonsiff of Hathazaree, dated the 20th August 1872.

Mahomed Warris (one of the Defendants), *Appellant*,

versus

Pitambur Sen (Plaintiff), *Respondent*.

Baboo Debendro Narain Bose for Appellant.

Baboo Aukhil Chunder Sen for Respondent.

Certain property having been released from attachment on a claim made under Act VIII. of 1859, s. 246, the attaching-creditor brought a suit, and obtained a decree establishing his right of attachment: HELD that the effect of that decree was to set aside the order of release, and to restore the state of things which it had disturbed.

Couch, C.J.—A CLAIM was made under section 246, and the Court made an order releasing the property from attachment. The section provides that the order shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order.

A suit was brought, and the plaintiff obtained a decree establishing his right, namely, a right to attach the property showing that the order for the release of the property from attachment was improper. The effect of that decree must be to revive the attachment, or rather not to revive the attachment, but to set aside the order of release which had been made, and therefore to make the property still subject to the attachment, to restore the state of things that had been disturbed by the order of release.

That seems to be a reasonable construction of the section, for otherwise, although it was shown by the result that the attaching party was right in his proceedings, and that the attachment was proper and such as entitled him to be paid in preference to any other creditor, other creditors, whilst he was seeking to establish his right, might step in, and, by attaching the property, deprive him altogether of the benefit of his proceedings. The Judge has held that he was the person entitled to be paid under section 270, and we think he has rightly held it.

The appeal must be dismissed with costs.

The 20th April 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Act VII. of 1865—Cutting Timber—Rules of Equity.

Case No. 1017 of 1873.

Special Appeal from a decision passed by the Judicial Commissioner of Assam, dated the 21st February 1873, modifying a decision of the Moonsiff of Nowgong, dated the 28th November 1872.

The Deputy Commissioner of Nowgong on behalf of Government (one of the Defendants), *Appellant*,

versus

Nothiram Bhuaya (Plaintiff), *Respondent*.

Baboo Unnoda Pershad Banerjee for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

Where timber had been cut and sold by a person who had no authority to do so, and was confiscated by Gov-

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ernment under Act VII. of 1865, HELD that Government was justly liable for the expense of conveying the timber from the place where it was lying; but was not equitably chargeable with the expense of cutting the timber, which was a wrongful act.

Couch, C.J.—THE timber was cut by the plaintiff prematurely. The order of the Collector did not authorize the cutting. It was intended that there should be a further order which would authorize that, and the seizure of the timber by the Government under Act VII. of 1865 was legal. The plaintiff had no power to sell the timber to Mr. Henderson, and the Moonsiff is right in that part of his judgment where he holds that it could not be a sale, because the plaintiff was not the owner of the timber.

But then it appears that the timber although confiscated, was conveyed by means and at the expense of the plaintiff from where it was lying, and was used by Mr. Henderson for the Government. Having thus had the benefit of the plaintiff's services and of the carriage of the timber, the Government ought to pay for them. But there is no equity to make the Government pay the plaintiff the expense of cutting the timber which he did without proper authority, and had in fact no right at the time to do. That was a wrongful act on his part, and no equity can arise from it against the Government to pay him for the expense he incurred in doing it.

The Judicial Commissioner appears to us to have looked at the case as one of hardship and (according to the sense in which the word equity is often used) as a matter of equity, and he has considered that the plaintiff ought to recover all the expenses he has been put to of cutting down the trees, as well as of carrying them to the place where they were used by Mr. Henderson. But this is not what is properly called equity. Equity is governed by some fixed rules, and we think that, if the Judicial Commissioner had perceived that he was in fact making the Government pay the plaintiff for doing a wrongful act—an act for which the Government had legally confiscated the timber—he would have seen that it could not properly be called equity. The expense of felling the timber, we understand, amounts to Rs. 27-8. That sum must therefore be deducted from the amount which has been awarded to the plaintiff. Each of the parties to the appeal must pay his own costs.

The 20th April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Mor... *Judges.*

Evidence—Probabilities.

Case No. 1213 of 1873.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 8th April 1873, reversing a decision of the Moonsiff of Tajpore, dated the 20th November 1872.

Lallah Jha (Plaintiff), *Appellant,*

versus

Mussamut Bibee Tullebmatool Zuhra and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Moonshee Mahomed Yusuf* for Appellant.

Mr. M. L. Sandel for Respondents.

Where the Lower Appellate Court, merely upon the appearance of a document, discarded the evidence of witnesses who testified to the making and signing of it, the High Court reversed its decision on the ground that probabilities, which are useful as aids in considering the true value of direct evidence, can seldom be safely had recourse to alone for the purpose of entirely invalidating direct evidence.

Phear, J.—IN this case the question between the plaintiff and the defendant is whether or not the bond upon which the plaintiff brought this suit was the bond of one Iftakharooddeen Hossein Khan executed by him with his own hand; if it was, it must be admitted that the plaintiff is entitled to recover from the defendant; if not, the plaintiff's suit ought to be dismissed.

The first Court, that of the Moonsiff, says: "I find that the genuineness and "authenticity of the bond on which the "claim is based have been established; for "the depositions of three witnesses, of whom "one is the scribe, and the other two are "marginal witnesses, and whose depositions "have been repeatedly taken in the presence "of the defendants who have appeared, show "that Iftakhar Hossein Khan, *alias* Nunhi "Khan, borrowed the sum of Rs. 546 of "plaintiff, and, getting the bond written out, "delivered it to the plaintiffs after writing the "signature with his own hand. There is no "good and sufficient evidence to suspect the "deposition of the said witnesses, because "they seem to be respectable men, and the "reason given by them as to how they came "to be present at the place of execution of

the bond is not improbable. Therefore, in reliance upon the deposition of the said witnesses, the Court finds the bond genuine and authentic. And the Court believes the bond to be genuine, the more because the defendants caused two pottahs to be called for from witness Digambur Singh, and to be filed by him with the record, with the view to show that these pottahs bear the signature of Iftakharooddeen Hossein Khan in his own pen, which signature does not tally with that on the bond on which the suit is based. On comparing and collating the signature on the bond on which the suit is based with those on the pottahs produced by Digambur Singh, it seems that the signatures on all the three documents are in the handwriting of one and the same person. Hence the depositions of plaintiff's witnesses appear perfectly true. No doubt the signature on the bond is in Iftakharooddeen Hossein Khan's own pen; and when it has been proved to have been signed with his own pen, there remains no doubt about the genuineness of the bond. Besides, it is well known that no one brings a false suit against another without sufficient cause, and in this case there appears no cause for bringing a false suit."

On appeal against this judgment to the District Judge, the Lower Appellate Court says:—

"I do not agree with the Moonsiff in the decision at which he has arrived.

"To my eyes the bond bears a very suspicious look. The paper on which it is engrossed appears to me as if it had been previously used for something else. The ink runs, which suggests erasures, and that the paper has been tampered with, whilst the signature of the executant looks quite fresh. The Moonsiff states that he compared the signature of the executant with that on the pottah, and found that they corresponded. Here I differ from him. I examined them narrowly, and they do not tally. The one is written in a cramped hand, and the other in a bold one. There is nothing whatever to show that the executant ever had any dealings with the plaintiff prior to this; he was a wealthy man, but had he not been so, the plaintiff would not have failed to register the bond for so large an amount. Moreover, the attesting witnesses would have been residents of his own village, whereas they have been picked up anywhere." And on this grounds the Lower Appellate Court reverses the decision of the Moonsiff, and dismisses the plaintiff's suit.

Now it is very obvious that the material upon which the Moonsiff places his judgment is the very strongest possible, provided the credibility of the witnesses is assumed. These witnesses by their testimony spoke to the fact of the writing out of the document, the execution of it, the paying of the money, the circumstances under which the loan took place, and how they came to be present at the time of the transaction.

If their testimony can be relied upon, then the case of the plaintiff is entirely made out. And the collateral facts to which the Moonsiff refers—for instance, the fact that these witnesses have been examined upon the same point more than once before in the presence of the very same parties, and that in these examinations they had never swerved from their testimony in any material degree, and also the fact that the signature which purported to be the signature of Iftakhar written with his own hand corresponded very well with the acknowledged signature of his written upon two certain other pottahs—as corroborating facts are of considerable force. The Judge has reversed this decision, unfortunately without expressing any opinion as to the credibility of the witnesses who speak to the execution of the deed. He leaves that point apparently untouched. He does not say that he perceived in their depositions either individually or on comparing them with one another any cause for distrusting their testimony. He does not say that there are any circumstances proved by evidence before him upon which he should be led to doubt the facts deposed to by these witnesses. He gives no reason for coming to the conclusion that the persons who testified to the circumstances attendant upon the execution of the bond, had committed perjury, unless it be those probabilities, for they are nothing higher than probabilities, which he infers or derives from the appearance of the paper before him, and from the fact that it was not registered, and that the witnesses were not inhabitants of Iftakhar's own village. He says that the bond does not look like a genuine document. It appears as if the paper "had been previously used for some-"thing else. The ink runs, which suggests "erasures, and that the paper has been "tampered with." It is not quite clear what the Judge intended to convey by "the document being tampered with." If the bond is a forgery, it must, we suppose, be a fabrication from beginning to end. It is not a

writing which had originally been real, and had been subsequently tampered with, and made to appear like something else. But possibly the expression "tampered with" was here used not quite in its ordinary sense. No doubt, in a case of disputed authenticity of a document, the appearance which the paper presents may afford some valuable evidence, but, at the same time, it is evidence which may often mislead, and particularly if the person who is using it is not an expert in regard to it. It is going a long way to say, merely upon the appearance of the document itself, that the three witnesses who testified to the facts of the making and the signing of it were committing perjury. The same may be said with regard to the comparison of the two signatures. It may be said generally that no two real signatures of any person accustomed to write freely ever correspond exactly; there is always some degree of diversity between them. And in making the comparison between two real signatures, the opinion of people would differ as to the amount of apparent diversity. The judgment may well enough be led astray to the erroneous opinion that the diversity which is apparent is inconsistent with the identity of the two signatures.

Again, although there might be nothing in the evidence to show that the executant ever had dealings with the plaintiff, yet still the truth might be either the one way or the other. It might be, notwithstanding the absence of this evidence, that the plaintiff had, in fact, had previous dealings with the defendant, or again, it might be that he had never had previous dealings with the plaintiff, and this was his first dealing—a real loan-transaction.

And again, lastly, we may remark that, although it may appear probable to the Judge that the attesting witnesses would in a case of a real transaction of loan have been taken from amongst the residents of the borrower's own village, still it might be otherwise.

In truth, these remarks of the Judge bring to view nothing more than probabilities which are useful enough as aids in considering the true value of direct evidence, but which can seldom be safely had recourse to alone for the purpose of entirely invalidating direct evidence.

It seems to us upon the best consideration which we have been able to give to the judgment of the Lower Appellate Court, that the facts found by the Judge, and those which we must take from his silence with regard to the evidence mentioned by the Moonsiff, are not sufficient to support that judgment which reverses the decision of the Moonsiff. We therefore think that the Moonsiff's decision ought to stand. That being so, it is not necessary for us to go into the other question which has been raised, namely, whether the remand-order which had sent back the case to the Moonsiff for re-trial and under which the re-trial was had which has led to this appeal, was rightly or properly made or not, because the decree which has been passed now is the same as the decree which was passed before the remand-order. It is not, however, perhaps out of place to say that we have no doubt that the remand-order was certainly good as regards the two appealing defendants.

The result is, we think, that the decree of the Lower Appellate Court must be reversed and the decision of the Moonsiff affirmed with costs in both the Courts.

The 20th April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Rent in Kind—Right of Suit.

Case No. 1228 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 18th February 1873, modifying a decision of the Moonsiff of Jamye, dated the 29th June 1872.

Mussamut Bibee Jan (Plaintiff), *Appellant,*

versus

Bhajul Singh (one of the Defendants), *Respondent.*

Mr. C. Gregory and *Moonsiff Mahomed Yusuf* for Appellant.

Mr. R. T. Allan and *Baboos Nil Madhub Sen* and *Hureehur Nath* for Respondent.

In a suit for arrears of rent, where plaintiff failed to make out his title to *bhowlee* rent, or rent in kind, the first Court, finding that the evidence established a commutation of *bhowlee* rent into rent in money, dismissed the suit with a reservation of plaintiff's right to sue again for *nugdee* rent. The Lower Appellate Court, agreeing in the first Court's view of the facts, and, finding that defendant admitted that he owed rent in money, decreed the claim to the extent of the admission:

HELD that the Lower Appellate Court was right, and that the reservation of right by the first Court was of doubtful operation.

Phear, J.—So far as we are concerned the plaintiff in the present suit on this appeal, we may say that the plaintiff claimed from the defendant arrears of rent in respect of certain lands which he said were let out to the defendant on the terms of a *bhowlee* lease, that is, rent in kind, and that he estimated the value of this rent to amount in the whole to 400 and odd rupees.

The first Court was of opinion that the plaintiff failed, by his evidence, to make out that he was entitled to rent in kind. The Moonsiff thought that the evidence established a commutation of the *bhowlee* rent into *nugdee* rent, but he did not assess the amount of it. And in this view of the facts the Moonsiff dismissed the plaintiff's claim under the impression that the plaintiff might, if so advised, sue again to recover his rent for the same period as on a *nugdee* tenure, whatever that might be.

On appeal against this decision, the Judge agreed with the Moonsiff as to the facts which are to be proved by the plaintiff, but thought that the plaintiff had no further cause of suit in respect of the rent for which the suit was brought. He also thought that the plaintiff was entitled, in lieu of the *bhowlee* rent which he claimed, to so much *nugdee* rent as the defendant in his written statement had admitted he was bound to pay to the plaintiff. The plaintiff sued for arrears of rent. The defendant admitted that he owed rent at a certain rate in money to the plaintiff, but denied that he was bound to pay rent in kind amounting in value to the sum which the plaintiff claimed. The Judge thought, upon this state of the facts, that the plaintiff was entitled to recover arrears of rent to the amount which the defendant admitted.

And it seems to us on the whole that the Judge was right. It is more than doubtful whether such a reservation of right of suit as that which the Moonsiff affected to make in favour of the plaintiff could be operative. The plaintiff had brought his suit to recover from the defendant arrears of rent due to him in respect of certain years. He endeavoured to make out by his evidence that those arrears amounted to a certain sum of money calculated upon the footing of a *bhowlee* rent, that is to say, rent in kind. If he failed to make out the amount in this way, still the fact would remain that he had brought his suit to recover arrears of rent for the given years. And the decree, which the Moonsiff had passed against him in this suit, notwithstanding the reservation of right of further suit which could not be part of the decree itself, must have its effect, whatever that might be, under the provisions of the Civil Procedure Code, in the event of his bringing a second suit to recover arrears of rent estimated in any other way in respect of the same period of time and for the same land. And, as the defendant did, by his written statement, admit that rent was due to the plaintiff, for the year in respect of which the plaintiff sued, at the rate of Rs. 3 per beegha, and an issue was joined between the parties upon this allegation, it seems to be right that the Court should give the plaintiff a decree to that extent. We think, therefore, that there is no reason, on special appeal, for disturbing the decision of the Lower Appellate Court, and accordingly we dismiss the appeal with costs.

The 20th April 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Dependant Talookdars—Enhancement of Rent—Notice—Reg. VIII. of 1793, ss. 48 and 51—Act X. of 1859, s. 13.

Case No. 1865 of 1873.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 8th May 1873, affirming a decision of the Officiating Assistant Commissioner of Maunbhoom, dated the 10th January 1873.

Rajah Nilmoney Singh Bahadoor (Plaintiff), *Appellant,*

versus

Ram Chuckerbutty and another (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Bhowanee Churn Dutt* for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

Tenants, holding a permanent transferable interest intermediate between the proprietor and the ryots, and one which has been in existence from the time of the decennial settlement, are entitled, before they can be sued for enhancement of rent, to a notice which not only specifies the rent, but also states the ground on which the enhancement is claimed, and shows how the landlord has the right of enhancement, as well as the particular ground on which the rent is to be raised.

The fact of not having been registered under the provisions of Regulation VIII. of 1793, s. 48, does not deprive them of the benefit of s. 51.

Markby, J.—In this case it has been found that the defendants have "a permanent transferable interest in the land intermediate between the proprietor of the estate and the ryots," that the holding is a *maghlee* or, as the first Court calls it, a *tullabee* brahmatur one; and that it has been held as such from the time of the decennial settlement.

This being so, the question we have to determine is whether the defendants, before a suit can be brought to fix their rent at a higher rate than has been hitherto paid, are entitled to a notice in which it is set forth upon which of the grounds stated in section 51 of Regulation VIII. of 1793 the plaintiff intends to rely.

The first point to be considered is whether the defendants are persons who can claim the benefit of this section. I think that they can. Not being ryots, I do not see how we can say that they are anything else than dependant talookdars. Neither of these terms have been defined with any degree of accuracy, but I think the two terms together cover every ordinary tenure of a permanent and transferable character under the zemindar.

The next point is whether the defendants are entitled to a notice; and, if so, in what form. Independently of any special provision of the law, I should say that, before a tenant can be summoned into Court to have his rent adjusted, he is entitled to a notice informing what rate of rent the zemindar demands. The matter, however, is not left in this position, but has been specially provided for. By Regulation V. of 1812, section 9: "No cultivator or tenant of land "shall be liable to pay an enhanced rent, "though subject to enhancement under "subsisting Regulations, unless written "engagements for such enhanced rent have "been entered into by the parties, or a "formal written notice have been served on "such cultivator or tenant at the season of "cultivation, *viz.*, on or before the month of "Jeyt, notifying the specific rent, under the "landholder's right of enhancing it, to which "he will be subject for the ensuing Fusli, "or for the current Bengal year."

This section was repealed by Act X. of 1859; and I only refer to it as assisting us to ascertain the present law.

This last Act provides by section 13 that "no under-tenant or ryot, who holds or "cultivates land without a written engage-"ment, or under a written engagement not "specifying the period of such engagement, "or whose engagement has expired or has "become cancelled in consequence of the "sale for arrears of rent or revenue of the "tenure or estate in which the land held or "cultivated by him is situate, and has not "been renewed, shall be liable to pay any "higher rent for such land than the rent "payable for the previous year, unless a "written notice shall have been served on "such under-tenant or ryot in or before the "month of Cheyt, specifying the rent to "which he will be subject for the ensuing "year, and the ground on which an enhance-"ment of rent is claimed."

Upon this section there is a decision of the Privy Council (3 Weekly Reporter, P. C., p. 3) which settles an important point which might be otherwise disputable, namely, that its provisions are applicable to a tenant who holds his tenure immediately under the proprietor of the soil. This appears from the last paragraph of the judgment where the sufficiency of notice is discussed.

The defendants are, therefore, entitled to a notice which not only specifies the rent, but which also states the ground on which the enhancement of rent is claimed.

It might be contended that the "ground" here alluded to is not the ground upon which the tenure belongs to that class which is capable of being enhanced (section 51, Regulation VIII. of 1793), but the ground upon which a tenure capable of being enhanced is raised to a higher rate.

But it appears that, before this statute was passed, and whilst section 9 of Regulation V. of 1812 was still in force, that it had been decided that the notice must show the former of these grounds, namely, how the landlord has the right of enhancing the rent under section 9 (S. D. A. Select Reports, 29th February 1844).

I think, upon the whole, that the Legislature did not intend to alter the law in this respect when it substituted the provisions of section 13 of Act X. of 1859 for the repealed law; although, as appears from the decision of the Privy Council above referred to, the particular ground on which the rent is to be raised must also be shown by the notice.

It has, indeed, been argued that the defendants, though they may be dependant talookdars whose tenure has existed from the time of the permanent settlement, are not entitled to the provisions of section 51 of Regulation VIII. of 1793, because they were not recorded as such by the zemindar under the provisions of section 48; and such a

intention did undoubtedly receive some countenance of authority from the Court of Sudder Dewanny Adawlut. But this opinion was overruled by the Privy Council in the case of Bama Soonduree Dossee *vs.* Radhika Chowdhrain and others (13 Weekly Reporter, P. C., p. 11).

Even, therefore, if these defendants were not registered exactly as the law requires, that will not deprive them of the benefit of section 51.

The notice in this case does not make any allusion to the conditions of enhancement stated in section 51. It is, therefore, bad, and the suit was rightly dismissed.

The special appeal will be dismissed with costs.

Mitter, J.—I concur in holding that the notice in this case is bad and cannot support the plaintiff's claim. The lower Courts have found that the defendants have "a permanent transferable interest in the land intermediate between the proprietor of the estate and the ryots;" and further, that it has been in existence from the time of the decennial settlement. This finding is sufficient to entitle the defendant to claim the benefit of the provisions of section 51 of Regulation VIII. of 1793. The notice in this case admittedly does not specify any one of the grounds mentioned in that section, and consequently it is not sufficient in law to raise the rent of the defendant's tenure.

The 20th April 1874.

Present :

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Enhancement of Rent—Notice.

Case No. 1925 of 1873.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 6th May 1873, affirming a decision of the Extra Assistant Commissioner of Maunbhoom, dated the 15th January 1873.

Rajah Nilmoney Singh Bahadoor (Plaintiff), *Appellant,*

versus

Sreemutty Sagurmonee Debia (Defendant), *Respondent.*

Baboos Kalee Mohun Doss and *Bhowanee Churn Dutt* for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

A suit for enhancement of rent after a notice in which a distinct ground of enhancement has been mentioned, ought to be tried on the merits, unless it appears that by law the ground cannot be maintained, or that the case being one in which a special form of notice is required that notice has not been given.

Markby, J.—It has been held by us in the case just now decided* that dependant talookdars who are entitled to the benefit of the provisions of section 51 of Regulation VIII. of 1793, must receive a notice in the form which that section indicates. But it is not found that these defendants are persons who would be entitled to the benefit of these provisions. It was conceded that these provisions only apply to tenures which were in existence at the time of the Permanent Settlement; and that this tenure was then in existence has not been found.

The defendants still, however, contend that the notice delivered to them is insufficient. But beyond these provisions and those contained in section 17 of Act VIII. of 1869 (B.C.), there is no enactment which declares upon what grounds the rent of a tenant may be adjusted by the Courts.

The defendants are, under section 13, no doubt entitled to a notice which shows the ground of enhancement upon which the plaintiff intends to rely. But if the tenants are neither ryots entitled to the protection of section 17 of Act X. of 1859, nor dependant talookdars entitled to the protection of section 51 of Regulation VIII. of 1793, it must be a matter of inquiry in each case whether the plaintiff can enhance the rent on the ground which he stated in the notice. The suit cannot be dismissed merely upon the ground that a notice in the form given by the statute as applicable to ryots has been delivered. A notice in the form applicable to ryots may, *mutatis mutandis*, be applicable to tenures of another description.

A decision has been referred to reported

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* See previous case.

in 4 B. L. R., Appendix, 62. * With the decision of Mr. Justice Phear in that case I entirely agree. I think that, if a distinct ground of enhancement has been mentioned in the notice, the case ought to be tried on the merits, unless it appears that by law the ground cannot be maintained, or, that the case being one in which a special form of notice is required, that notice has not been given. With regard to the observations of Mr. Justice Mitter that the tenure in that case (a talook) could not be enhanced at all except under positive law, custom, or agreement, and that a notice which does not specify any ground of enhancement sanctioned by either of these was, therefore, bad, I feel bound to say, notwithstanding the very great respect which I have for the opinion of that learned Judge, that I cannot quite agree in this opinion. I think, as I have said, that the right to enhance must be decided when the case is heard and the terms and conditions of the tenure have been fully ascertained. The right of a zemindar or other landholder to raise the rent of a tenant whose tenure is permanent is a very peculiar one, and difficulties may arise in determining how it is to be exercised. But I cannot reconcile what Mr. Justice Mitter says as to the nature of the right, with the observations of the Privy Council upon the same subject in the case reported in 13 Weekly Reporter, P. C., p. 10.

The judgments of both the lower Courts must be set aside, and the suit remanded to the first Court for re-trial.

Of course, although the defendants have

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* The 3rd February 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Case No. 2549 of 1869.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 20th August 1869, affirming a decision of the Deputy Collector of Jamalpore, dated the 7th April 1869.

Gobind Coomar Chowdhry (Plaintiff), *Appellant,*

versus

Huro Chunder Nâg and others (Defendants), *Respondents.*

Mr. G. C. Paul and *Baboo Romesh Chunder Mitter* for Appellant.

Baboos Hem Chunder Banerjee and *Kishen Dyal Roy* for Respondents.

Phear, J.—I THINK that unless we are prepared to differ from the judgment of a Division Bench of this Court given in the case of Kalee Nath Chowdhry,† we must hold that the Judge below was right in his decision.

In this notice, the appellant, after first setting out his own zemindaree title, says: "That you are in possession of the mouzahs, kismuts, debats, and chucks, &c., appertaining to the said talook as per schedule given below, without effecting any settlement as to the jumma, and executing any kubooleut in respect of the same; that as the rate of rent of the said land is below the rate prevailing in the pergunnah and in adjacent places, and as the productive powers of the land and the value of the produce have increased, and as the puteet land has been cultivated, I am entitled to receive from you Rs. 794-5-7-11¼ kts. per annum, according to the rate specified in the schedule."

It appears to me that this notice is quite as bad, for indefiniteness and uncertainty, as the notice which was held to be insufficient in Kalee Nath Chowdhry's case.

It has been argued before us that this notice specifies three grounds of enhancement. If it does so, I think this is done in so uncertain a manner as to leave it impossible to say whether these three grounds have reference to the rates of rents of talookdars, or to the rates of rents of ryots.

The first, namely, that the rate paid for the said land is below the rate prevailing in the pergunnah and in adjacent places, points, in my mind, rather to ryotee rates than to talookdaree rates; and certainly the inference which one would first draw from the reference to the productive power of the land, to the increase in the value of the produce of the land, and to the increase of the culturable land, without further words of explanation, is that the plaintiff had regard to rents payable by ryots rather than to rents payable by talookdars. It is a very long step indeed from increase in the productive power of the land, to increase in the rents and profits derived, or capable of being derived, by the talookdar from his talook.

I am inclined to think with Mr. Paul that if a distinct ground of enhancement had been mentioned in the notice, unless it also appeared on the face of the notice that by law that ground could not be maintained, the Court ought not to dismiss the case without going into the merits.

It is, I think, the plaintiff's look-out to see that he can establish, on the ground which he specifies, a right to receive enhanced rents. We know nothing in this case relative to the evidence which it may be in the power of the plaintiff to give in support of his claim, but I think that the tenant is entitled, on the authority of the case which I have cited, and of the other cases therein referred to, to a distinct and specific statement in the notice of enhancement, such as is beyond the reasonable possibility of mistake, of the ground of enhancement on which his landlord relies.

I have already said that, in my opinion, the notice before us does not contain such a distinct statement, and therefore it seems to me that the appeal should be dismissed with costs.

Mitter, J.—I concur in the judgment just delivered by Mr. Justice Phear.

I do not think that the rent of a tenure like the present can be enhanced, except under some positive law, or under some custom having the force of law, or by virtue of some agreement between the landlord and tenant.

In the present case, the notice does not specify any ground of enhancement sanctioned by any positive enactment, or by any custom having the force of law, or by any agreement by which the defendant has made himself liable to pay the enhanced rent which the plaintiff seeks to recover.

Under these circumstances, I am clearly of opinion that the notice in this case does not specify any ground of enhancement on which the plaintiff, special appellant, could have enhanced the rents of the tenure in question, and that the present case is precisely similar to that referred to by my learned and hon'ble colleague.

I am of opinion, therefore, that this appeal ought to be dismissed with costs.

† 12 W. R. 506.

not been yet found to be dependant talookdars entitled to the benefit of section 51, yet, if they should on remand be found to be so, the suit will be dismissed.

Mitter, J.—I am also of the same opinion. I desire to add that the case quoted by the lower Courts* does not warrant their conclusion. What I understand that case to decide is that regard being had to the particular nature of the tenure in it, the notice was insufficient in law, inasmuch as it did not specify as the ground of enhancement those mentioned in section 51, Regulation VIII. of 1793. It was further held that the notice was also bad, because it was vague and indefinite in its character, and treated the defendant, who was proved to have been a holder of an intermediate tenure, as an ordinary ryot. None of the grounds of that decision applies to the facts of this case. It has not been found that the tenure of the present defendant is of the nature mentioned in section 51 of Regulation VIII. of 1793, and the notice does not treat him as a *ryot*, but describes him as a *tenant*, the word used being *proja*.

The 21st April 1874.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Non-delivery of a Bond—Obligee's Right of Action.

Reference to the High Court by the Judge of the Small Cause Court at Midnapore, dated the 17th March 1874.

Sreemuttee Pearee Monee Dossee, *Plaintiff,*

versus

Thakoor Doss Dutt, *Defendant.*

If an obligor fraudulently withholds delivery of a bond which has been executed within a reasonable time after receipt of the money, the obligee has a right to sue for the return of the money before the time fixed for payment.

Case—Under section 1, Act X. of 1867, I have the honor to submit the following statement of a case for the decision of the Hon'ble Court:—

Plaintiff alleges that the defendant on executing a bond borrowed of her the sum of Rs. 75; that for the purpose of registration the defendant produced the bond and admitted execution thereof before the Registrar; that after registration the defendant has fraudulently withheld delivery of the bond to the plaintiff on a false assertion that he has not received the consideration-money in full, nor has he transferred the registry office receipt to the plaintiff after repeated demand, so that the latter has been quite unable even to take out the bond herself from the registry office, where it still lies. The plaintiff, therefore, sues the defendant for recovery of the principal money lent, with interest up to date of suit before the expiry of the time fixed for repayment in the bond, and her pleaders say that non-delivery and fraudulent conduct of the defendant give the plaintiff a cause of action for recovery of the money. The defendant's pleaders take a preliminary objection to the suit on the ground that the plaint discloses no cause of action; that she is not entitled to recover the money before the time fixed for repayment; that non-delivery cannot repudiate a contract which has been otherwise complete. They argue that by proposal and acceptance the contract has been complete, and that delivery is not essential to a contract like this. They cite the case of Gooroo Pershad Roy *vs.* Roy Dhunput Singh, 5 B. L. R., App., 46,* and 10 Weekly Reporter, p. 351, Sujwan Singh *vs.* Rampul Singh, and on the merits they aver that the defendant has only received 7 out of 75 rupees, and that he is willing to deliver the bond as soon as he gets the remaining portion of the consideration-money, and that the plaintiff had once asked for delivery which the defendant refused on the ground that he has not received money in full, and that the bond was at the registry office.

I think the preliminary objection ought to be overruled. The facts of the cases cited are different from those of the present case. In those cases there was a delivery, while in this case the defendant has withheld delivery. It was no doubt an implied contract between the parties that the defendant was to execute and deliver a bond in favour of the plaintiff, and that the latter was to lend money. The plaintiff, if his allegations be true, has fulfilled his part of the contract, while if, after receiving money, the defendant refuses delivery of the bond, the plaintiff has a right to say that "as you have not given me the bond you must give me back my money; either you must give me the bond, or else you have no right to keep my money with you." If it

* 14 W. R. 251.

* 14 W. R. 20.

be held that an obligee has not the right to sue for money before the time fixed for payment of the money, notwithstanding the refusal of the defendant to deliver the bond, money-lenders will be defrauded, and obligors will have the means of harassing them. It was contended that the plaintiff has a remedy by a suit for delivery of the bond. I think that is not the only remedy which is open to him; he can either sue for delivery of the bond, or for the recovery of the money, but he is not, it appears to me, confined to seek the first remedy only. It was argued that the principle laid down in the case of Gooroo Pershad Roy *vs.* Roy Dhunput Singh wholly applies by analogy to this case, but the facts of that case are not on all fours with those of this case. If the obligor fraudulently withholds delivery of the bond within a reasonable time after receipt of the money, it is only fair and equitable that he should be made to give up the money he has taken. Even though the time originally fixed for repayment has not arrived, I find from the evidence adduced in this case, and from the defendant's statement before the Registrar, that he has withheld and refused delivery on the assertion that he has not received the full consideration-money. If it turns out from the evidence on the merits that the defendant has received full consideration-money and has acted fraudulently towards the plaintiff in not having delivered the bond within a reasonable time, the latter is entitled to receive back his money, and the contract will be reckoned null and void. If it turns out that he has not received money in full, he has every right of keeping the bond with him till he receives the whole sum. Now, if the defendant has the right to keep the bond until he receives the consideration-money, the plaintiff, it may be said, has also the right to say to defendant that "as you have not delivered the bond though you have received the full sum, you must give me back my money." For these reasons I think the present suit for money is maintainable; but at the earnest solicitations of the defendant's pleaders, and as the point is important, I beg most respectfully to submit the case to the Hon'ble High Court for their opinion on the point, whether, under the circumstances stated, the plaintiff can sue the defendant for recovery of the money lent by her, before the expiration of the time originally fixed for repayment, which is the month of Assar 1283. I beg further to state that pending this reference, the case has not been tried on the merits.

The judgment of the High Court was delivered as follows by—

Markby, J.—The case which has been referred to in the 10th Weekly Reporter, p. 351, does not appear to have any application to this case. We think that the view taken by the Judge of the Small Cause Court is a right one, and that the suit is maintainable.

The 21st April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris
Judges.

Conveyance of Ancestral Property—Hindoo Widow—Reversioner.

Case No. 1249 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 22nd March 1873, affirming a decision of the Moonsiff of Sewan, dated the 25th September 1871.

Joy Mooruth Kooer and another (Plaintiffs), *Appellants,*

versus

Buldeo Singh and others (Defendants), *Respondents.*

Baboo Tarucknath Dutt for Appellants.

Mr. R. E. Twidale and *Baboo Judoo Nath Sahoy* for Respondents.

Where property to the immediate possession of which a Hindoo widow is entitled, is conveyed away by parties having no right to it, the cause of action for a suit to recover possession is afforded thereby to the widow, and not to reversionary heirs.

Quære.—Have not the reversionary heirs a right to ask for a declaratory decree to the effect that, as against ultimate heirs, the possession of the trespassers and others should be considered as the possession of the widow?

Phear, J.—We think that the decision of the lower Courts is correct, although it is not necessary for us, in the view which we have taken, to discuss the ground upon which the decree of the Lower Appellate Court was based. It seems now to be beyond question upon the facts that the plaintiff is not entitled to the immediate possession of the land which forms the subject of suit. According to the case of all parties, this land formed a portion of the property of one Lungut Ojha, and it descended from him to his two widows, Ram Kali Kooer and Luchmina Kooer, who took it in moieties, and enjoyed each her moiety separately. Luchmina is still alive; and therefore she is, by Hindoo Law, entitled, by right of survivorship, to the moiety of Ram Kali Kooer, deceased, unless she has, by her own act, given up that right either to the plaintiff or any one else. There is no evidence whatever suggested by the plaintiff to the effect that Luchmina Kooer has done anything of the kind. Consequently, we must take it that the property in suit, which, the plaintiff says, was the moiety taken and enjoyed by Ram Kali Kooer, goes by survivorship to Luchmina Kooer. But the essence of the plaintiff's suit is that she claims to be entitled to the immediate possession of this moiety on the ground that she is the heir of Luchmina Kooer, and that the alleged conveyance by which Buldeo Singh and other defendants claim a right to the possession of the property constitutes a cause of action such as entitles her to recover possession of the property. This conveyance is not a conveyance from Ram Kali Kooer, but a conveyance from the widow of Ram Kali Kooer's son, who, according to the case of the plaintiff, died in the lifetime of his father, and so, the plaintiff maintains, the conveyance is valueless, because it is made by a person who never had any title at all. In other words, the plaintiff says that Buldeo Singh and the other defendants are simply trespassers upon the property, and she seeks to turn them out and obtain possession of it herself.

This suit must fail for the simple reason that Luchmina Kooer, defendant, who is still living, and not the plaintiff, is the person who is immediately entitled to the property. But it is said that the plaintiff is the reversionary heir entitled to the possession of the property next after Luchmina, and, in that character, is at least entitled to defend and protect the inheritance. On that ground the plaintiff says that she is entitled to have a decree declaring the conveyance under which the defendants, Buldeo Singh and others, claim a void conveyance as against the ultimate heirs of Lungut Ojha.

We think it is enough at present to say that the suit is not brought in this form. It is plainly brought with a view to obtaining immediate possession of the property—a mode probably of protecting the inheritance which recommends itself greatly to ultimate reversioners, who, were it not for the cause of action, might otherwise never become entitled to the immediate possession. It may be more than doubtful whether, if the suit had been honestly framed for the simple purpose of protecting the inheritance, the proper relief to be asked for would have been a declaration that the conveyance was void. On the facts put forward by the plaintiff, Buldeo Singh and other defendants, excepting Luchmina, must be trespassers upon the property, and therefore Luchmina, who is entitled to immediate possession of the property, must have already a cause of action against them. It is she, and not the plaintiff, who would have the right to recover possession from them. It is possible, however, that the plaintiff, if she does possess the character of reversionary heir, that is, if she is the person who would be entitled to the immediate possession and enjoyment of the property if Luchmina were out of the way, might have a right to ask for a decree such as would prevent possible lapse of time and laches on the part of Luchmina in suing on her cause of action from operating to give the trespassers a title against the ultimate heirs of Lungut Ojha, that is, a declaratory decree to the effect that, as against the ultimate heirs of Lungut, expectant on Luchmina's death, the possession of the trespassers, Buldeo Singh and others, should be considered as the possession of Luchmina. As to this, however, it is not necessary for us to express any opinion. We think the plaintiff's suit, in the form in which she has chosen to put it, has entirely failed. And that consequently the decree of the lower Courts is right. The appeal is dismissed with costs. Luchmina as well as Buldeo and others must have their costs separately.

The 21st April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Act XVIII. of 1869, s. 28—Unstamped Documents—Bond—Promissory Note.

Case No. 171 of 1873.

Regular Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 1st May 1873.

Nundun Misser (Plaintiff), *Appellant,*

versus

Mussamut Chittur Buttee (Defendant), *Respondent.*

Mr. Trotman and *Baboo Mohesh Chunder Chowdhry* for Appellant.

Baboos Hem Chunder Banerjee and *Chunder Madhub Ghose* for Respondent.

A Judge has no authority to admit an unstamped document in evidence, excepting under the conditions prescribed in Act XVIII. of 1869, even where it was executed before the date when that Act came into operation.

A document in which a party, for value received, undertakes to pay a certain sum of money on or before a specified date, and interest thereon from another date, if the sum is not paid before, cannot be treated as a bond, but is in substance a promissory note within the words of s. 28.

Phear, J.—The only question that we have to decide upon this appeal is the question whether or not the Judge was right in holding that section 28, Act XVIII. of 1869, prevented him from allowing the document called the chittee, which is to be found in the first page of the appendix of the printed book, to be stamped and to be admitted in evidence upon payment of sufficient penalty.

Mr. Trotman has asked us to hold that, because the document itself was executed before the date when Act XVIII. of 1869 came into operation, therefore section 28 of the Act does not apply. But it seems to us that this contention is not just, and that the Judge was bound to comply with the Act, and had no authority to admit an unstamped document in evidence, excepting under the conditions prescribed in Act XVIII. of 1869. The document itself runs in these words:—

"Whereas I have borrowed Rs. 1,500 of "the Company's coin from you without "interest without a bond, hence I declare "that I shall repay, on or before the 15th "Falgoon Sooddee, the whole amount in "question in one lump, and take back this "chittee. Should I fail to repay the amount "in question on the above date, I will pay "interest at 1 rupee per cent. per mensem "from the 1st Cheyt—payment month after "month. Therefore I write this chittee for "the loan (*dust gurdan*) without a bond "that it may be of service in future."

In effect it seems to us that this document is nothing more than a promise to pay money at a specified period. It may concisely be put into this form:—

For value received, I undertake to pay you Rs. 1,500 on or before the 15th Falgoon next, and interest thereon from the 1st Cheyt, if not paid before.

And, if we consider it in this form, we think there can be no doubt that it is simply a promise to pay money at a future specified time. Mr. Trotman somewhat ingeniously argued that we might treat the contract exhibited by this chittee as being one in which there was a condition of defeasance if the money was paid before the 15th Falgoon, and so treat it as if it were a bond. But we cannot take this view. It appears to us that the chittee is in substance a promissory note within the words of section 28, Act XVIII. of 1869, and therefore the Judge had no power to allow it to be stamped In this view we dismiss the appeal with costs.

The 21st April 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. MacDonell, *Judges.*

Alluvial Formations—Contiguous Accretion—Possession.

Case No. 88 of 1873.

Regular Appeal from a decision passed by the Officiating Subordinate Judge of Dacca, dated the 30th December 1872.

The Collector of Dacca on behalf of Government (Defendant), *Appellant,*

versus

Kalee Churn Poddar (Plaintiff), *Respondent.*

Baboo Unnoda Pershad Banerjee for Appellant.

Baboos Sreenath Dass and *Sreenath Banerjee* for Respondent.

In a suit in which plaintiff claimed alluvial land in the possession of Government as being his by right of

accretion to his own estate, though the churs had re-formed on the original sites of lands belonging to other persons:

HELD that the case could not be decided on the principle that, inasmuch as those other parties were not before the Court, plaintiff had the better title as between himself and Government. The land was in the possession of Government, and plaintiff could only succeed by establishing a better title.

Jackson, J.—THE plaintiff in this case laid claim to an area of 2,742 beeghas, which, he alleged, was his by right of accretion to his mehal Chur Hukikutpore, 2nd division, and he added a claim by way of note that there was probability of a further accretion. Of his land, he alleged, he had been dispossessed by the Collector, who is defendant in this suit, by the Collector's disallowance of his claim to the land.

The Collector in his answer stated that the land under claim amounted to 3,149 beeghas, besides a chur then under water. Out of this amount the Subordinate Judge has given the plaintiff a decree for two portions of the land, one being 380 beeghas, which he finds to be land formed on the site of the plaintiff's property, *viz.*, the 2nd division of Hukikutpore, and another being 279 beeghas, which he finds formed in contiguity or as accretion to the original land of that property.

The Government has appealed against this decision, and the Government pleader stated before us to-day that he did not desire to press the appeal so far as related to the land which the Court below had found to occupy the original site of the plaintiff's estate, but that he could not consent to the verdict in respect of the 279 beeghas. The plaintiff has filed a petition under section 348 of the Code of Civil Procedure, complaining of the decision of the Court below in so far as it dismisses the rest of his claim. In regard to the 279 beeghas, which have been awarded to the plaintiff, the Subordinate Judge says: "It appears that the land formed on the site "of the second plot of Hukikutpore is 880 "beeghas, and that on the site of the sota, "which adjoined it on the east, measuring "279 beeghas, was formed in contiguity to "the original land of the aforesaid plot "No. 2. The said sota not being the right "and in possession of any person, there is "no reason to doubt that the plaintiff's right "of contiguous accretion to the uslee chur "will prevail in respect of the same (sota) "also." And a little further on he says: "Regarding the quantity of land gained by "the filling-up of the sota to the east of the "said land (plot No. 2) in contiguity to the "uslee chur, the plaintiff's right of contiguous accretion will prevail in respect of the "same on the ground that the said sota was "not the right of any person." Now, on referring to the evidence, it really does not appear that there was any ground for saying that the 279 beeghas formed as accretion to the plaintiff's estate any more than it did to the Government Mehal Chur 3 Hukikutpore; or, in fact, to any other of the neighbouring estates. There was evidence given on both sides, but it certainly cannot be said that the evidence on the side of the Collector was by any means inferior to that on the side of the plaintiff. The witnesses for the Collector all declared positively that the land in dispute formed as accretion to Chur Janajat, which is north of the disputed land. The plaintiff's claim is not founded upon any precise ascertained facts or data on which a jury might come to a verdict. He took vaguely and indefinitely the positions of certain pre-existing estates, and said that his estate lay to the north of one, east of another, and so on. He names the estates, but gives no limit. Whether they are 5 beeghas or 50 beeghas is not stated. They might come up to 5,000 beeghas. In fact, we do not find anything from which it would appear that the plaintiff is entitled to the land occupying the position of the former sota. As to the larger portion of the land given to the plaintiff, he succeeded on the ground of re-formation on the original site; and in a late case before the Judicial Committee—Nogender Chunder Ghose *vs.* Mahomed Esof, reported in 10 B. L. Reports, p. 433*—their Lordships have laid down that a "title founded on the "original ownership and identification of "site is to be confined *primâ facie* to the "re-formation on that site." Their Lordships go on: "And if, in the present case, it "had appeared that some part of the land in "dispute had been thrown up beyond the "original boundaries of the appellant's estate, "a question might fairly have arisen "between the appellants and the respondents "whether that was to be taken to be an "accretion to the estate of the former or to "the settled chur of the latter." But, as we have already said, this part of the lower Court's judgment is not objected to in appeal before us.

As to the remaining lands of the plaintiff's claim, our opinion is still more decisive. In regard to that, there is no evidence which can support it. The Subordinate Judge says: "As the quantities of land which are

* 18 W. R. 113.

"represented in the Ameen's map to have "re-formed on the original sites of the third "plot on the east, Chowry Chur on the south, "and Jahanabad on the west, the plaintiff's "right of contiguous accretion cannot hold "good in respect of the same, for the said "churs are formed on the original sites of "lands belonging to other persons, and there "is no reason to hold that plaintiff's right of "contiguous accretion will hold good in "respect of them." It is not contended that there is any error in the finding of the Court below that the churs are formed on the original sites of lands belonging to other persons; but it is argued for the plaintiff that, inasmuch as the parties, on the sites of whose properties these lands have re-formed, are not before the Court, as between the plaintiff and the Government, the plaintiff has the better title. This is not the principle on which the case should be decided. The land is in the possession of the Government, and, until any other party succeeds in establishing a better title to it, the Government is entitled to retain possession. The plaintiff cannot claim it, because the defendant's title is weak. He must succeed on the strength of his own title. We think, therefore, that the decision of the lower Court must be varied to the extent of disallowing the 279 beeghas given by the lower Court to the plaintiff, and that the objection under section 348 must be disallowed. Under the circumstances we think each party should bear his own costs.

The 22nd April 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, J. B. Phear, W. Ainslie, and G. G. Morris, *Judges.*

Act III. (B. C.) of 1870, ss. 3 & 5—Transferred Decrees—Applications.

Case No. 1601 of 1873.

Special Appeal from a decision passed by the Additional Judge of Backergunge, dated the 5th February 1873, affirming a decision of the Deputy Collector of Madareepore, dated the 30th November 1871.

Kishen Kishore Poddar (Plaintiff), *Appellant,*

versus

Woomesh Chunder Roy and another (Defendants), *Respondents.*

Baboo Rash Behares Ghose for Appellant.

Baboo Bhyrub Chunder Banerjee for Respondents.

After a decree has been transferred under the provisions of Bengal Act III. of 1870, any application in relation to it, *e. g.*, to set it aside, should be made to the Court to which it has been transferred.

This case was referred to the Full Bench, on the 20th January 1874, by Jackson and Ainslie, JJ., with the following remarks:—

Jackson, J.—We are under the necessity of referring this matter for the decision of a Full Bench. The question is whether, after a decree has been transferred for the purpose of execution under the provisions of Bengal Act III. of 1870, such decree having been passed *ex parte*, the application to set the decree aside should be made to the Court to which it has been transferred, or to the Court which originally made it; Division Benches of this Court having held in 16 Weekly Reporter, p. 255, and 18 Weekly Reporter, pp. 207 and 252, that the Deputy Collector had no jurisdiction to receive such applications in transferred cases, and the opposite opinion being laid down by Mr. Justice Norman and Mr. Justice Loch in 15 Weekly Reporter, p. 75, which has been followed in 19 Weekly Reporter, p. 128, by another Division Bench of this Court. It appears to us, as at present advised, that the 2nd and the 5th sections of Act III. of 1870 (B.C.) will not bear the meaning that has been put upon them in the case in 15 Weekly Reporter. Section 5 says: "Nothing in this Act shall "affect applications, not being applications "in suits, nor applications for execution of, "or in relation to, decrees transferred under "the provisions aforesaid."

Now the application made in this case was—whether it was made under section 119 of Act VIII. of 1859, or under section 58, Act X. of the same year—an application to set aside a judgment which has been obtained *ex parte*. It appears to us that such an application is most strictly and entirely an application in respect of a decree transferred, and that consequently the Act would apply, and, as the Act would apply, it is the Court, to which the decree has been transferred, that ought to deal with the application. With this expression of opinion we desire to lay the case for the decision of a Full Bench.

Before the Full Bench, Baboo Rash Behary Ghose, for the appellant, contended that, as the decree had been transferred

or the purpose of execution under the provisions of Bengal Act III. of 1870, and as the decree had been passed *ex parte*, the application to set the decree aside should have been made to the Court to which it had been transferred, and not to the Court which originally made it.

Section 5 of Act III. of 1870 (B.C.) says: "Nothing in this Act shall affect applications, not being applications in suits, nor applications for execution of, or in relation to, decrees transferred under the provisions aforesaid." The application in this case was an application, not only "for execution of," but also "in relation to, a decree transferred." Act III. of 1870 would consequently apply in the present case, and the Court which ought to deal with the application should be the Court to which the decree had been transferred. In the matter of Wooma Chunder Mojoomdar *vs.* Chunder Kant Roy Chowdhry, reported in 16 W. R., p. 255, and also in the case of Oodweent Mahtoon *vs.* Sidhee Chund Chowdhry, 18 W. R., p. 307, it was held that the Deputy Collector had no jurisdiction to receive applications like the present in transferred cases. The Courts which should hear and dispose of such applications under the provisions of Act III. of 1870 (B. C.) should be the Civil Courts, and not the Revenue Court, and the procedure which ought to be followed should be that of Act VIII. of 1859, section 119, and not that of Act X. of 1859, section 58.

Baboo Doorga Mohun Doss, for the respondents, contended that Act III. of 1870 does not apply in the present case, inasmuch as the *suit* was not transferred under section 2 of the Act, but the *decree* only was transferred to the Civil Court under section 3. Section 5 relates generally to *suits* in which judgments have been passed against defendants by default for non-appearance. Under the circumstances, therefore, the Revenue Court did not act without jurisdiction in taking up the question of a review of judgment when it did so. It appears clear from the case of Sreemutty Jugodumba Dossee, reported in the 15th Volume of the W. R., p. 75, that an application like the present one should be made to the Court which made the decree, instead of to the Court to which the decree was transferred. Mr. Justice Norman in this case says that "sections 2 and 5 of Act III. of 1870 show "clearly that any application in the suit as "to a matter prior to, or which might affect, "a decree must be made, not to the Court to "which the decree was transferred, but to "the Court by which the decree was made."

This decision was subsequently followed by Justices Kemp and Pontifex in the matter of Ram Soondur Banerjee *vs.* Doorga Churn Barui in 19 W. R., p. 128.

The judgment of the Full Bench was delivered as follows by—

Couch, C.J.—It appears to me that the Legislature has used words wide enough to include a case of this kind, doing what might reasonably be supposed to be their intention, and providing that, when a decree has been transferred from the one Court to the other, any application afterwards, whether for the execution of it, or to set it aside, should be made to the Court to which it has been transferred. It would be very inconvenient if one kind of application were to be made to one Court, and another kind to another Court. The 3rd section, after providing for decrees being transferred, says that such execution and proceedings may be had in respect of such decrees as if the same were decrees of the Court to which they shall have been so transferred. I do not understand these words as meaning that the proceedings are to be only proceedings in execution, but generally proceedings relating to the decree. If they were to be limited to proceedings in execution, the words should have been "and such execution and proceedings thereon in respect of such decrees." The words "proceedings in respect of such decrees" are wide enough to include an application to set aside a decree as having been made *ex parte*, and there being ground for setting it aside.

Then, in the 5th section, it is said that nothing in the Act is to affect applications not being applications in suits, nor applications for execution of, or in relation to, decrees transferred. These words show that the Legislature considered that applications in suits would be affected by the Act. In fact, all applications would be affected by it. An application in a suit where the decree has been transferred to set it aside is an application in the suit. It is also an application "in respect of" the decree. We must consider that those words were intended to include something more than proceedings in execution of the decree. They appear to have been inserted in order to give the Court as large an authority as possible where decrees had been transferred. It is to my mind much the more reasonable construction that, where a decree has been transferred to a Court, any application after that in relation to it should be made to the Court to which it has been

transferred. I think our answer to the question should be to that effect.

We shall reverse the decrees of both the lower Courts. The application to set aside the *ex-parte* decree will be transferred to the Court of the Subordinate Judge of Backergunge. The plaintiff will have the costs of this appeal. The parties will bear their own costs of the proceedings in the lower Courts, and the costs of the suit will abide the result.

The 22nd April 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, Louis S. Jackson, W. Markby, and W. Ainslie, *Judges.*

Act VI. (B. C.) of 1862, s. 20— Jurisdiction — Revenue Office (District or Sub-Divisional).

Case No. 242 of 1872.

Regular Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 16th July 1872.

A. B. Mackintosh (Plaintiff), *Appellant,*

versus

Kashee Nath Biswas (Defendant), *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboos Gopal Lall Mitter and *Dinonath Bose* for Respondent.

Under Act VI. (B. C.) of 1862, s. 20, a suit under that Act and Act X. of 1859 can only be preferred in the revenue office of the sub-division in which the cause of action has arisen.

When a suit has not been preferred in the revenue office of the sub-division in which the cause of action arose, but in the revenue office of the district, and has been referred by the Collector to another Deputy Collector, the decree is not void for want of jurisdiction, but is voidable only at the instance of the defendant.

This case was referred to the Full Bench by Couch, C.J., and Jackson, J., with the following remarks:—

Couch, C. J.—THE questions have arisen in this appeal whether, under section 20 of Act VI. of 1862 (B. C.), a suit under that Act or Act X. of 1859 may be preferred in the revenue office of the district when a sub-division of a district has been placed under the jurisdiction of a Deputy Collector, or can only be preferred in the revenue office of the sub-division in which the cause of action has arisen; and whether, when a suit has been preferred, not in the revenue office of the sub-division in which the cause of action arose, but in the revenue office of the district, and was referred by the Collector to another Deputy Collector, the decree in such suit is void for want of jurisdiction. As we are not prepared to agree with the decision on these questions in 3 Bengal Law Reports 366,* and the questions are of great importance, we refer it for decision by a Full Bench.

Before the Full Bench, the Advocate-General, for the appellant, contended that, as the suit was improperly instituted in the Collector's Court, he had no jurisdiction to try it, nor had he any jurisdiction to send the case down for trial to the Deputy Collector's Court. The decision of Mr. Justice Macpherson, in the case of Poorna Chundra Chatterjee *vs.* C. Macarthur, 3 B. L. Rep., p. 366,* is correct as to the questions referred to in the present case. Section 20 of Act VI. (B.C.) of 1862 commences by saying that "Suits under this "Act, or under Act X. of 1859, *shall* be "preferred in the revenue office of the "district." The word *shall* must have some meaning; it means that the Collector has exclusive jurisdiction to try all suits under section 20 of Act VI. of 1862 (B. C.), or under Act X. of 1859. If the Legislature intended it to be in the alternative, that is, parties could bring their suits either in the revenue office of the district, or in one of the sub-division Courts, the word *may* and not *shall* would have been used. Again, the proviso in that section is important, because if it be the law that parties are allowed to bring their suits either in the revenue office of the district, or in the sub-division Court, the words in the proviso are useless. There would be no necessity for the Collector to refer the case to another Deputy Collector, when that Deputy Collector, under the law, has the jurisdiction to hear the case himself. It appears, therefore, that the Legislature did not intend to give this alternative choice to parties. Such suits could only be tried by those Deputy Collectors who have been specially appointed to hear them; in all other cases, suits of this nature are only tried by the Collector. With regard to the second question, no doubt, the Collector has, under the provisions of Act VI. of 1862 (B. C.), authority to transfer suits, when properly instituted, from one Court to another subordinate to him. But, inasmuch as in the present case, the suit was instituted improperly in the Collector's Court, the Collector had no jurisdiction to transfer the

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* 12 W. R. 310.

ase to the Deputy Collector's Court. Mr. ustice Macpherson's decision is correct in very respect.

Baboo Gopal Lall Mitter, for the respondent, contended that the Collector had the jurisdiction to try the case. Even if it be conceded that the case ought to have been originally instituted in the Court of the Deputy Collector, the irregularity was not such as would necessitate quashing the decision in the case. The jurisdiction which is given to the Collector under Act VI. of 1862 (B.C.) is not restricted or taken away by any section, but rather enlarged by section 150 of Act X. of 1869, and by section 19, Act VI. of 1862. Section 19, Act VI. of 1862, says: "All the powers vested in the Collector by any of the sections of this Act, or of Act X. of 1869, may be exercised by any Deputy Collector in cases referred to him by a Collector, and in all cases without such reference by any Deputy Collector placed in charge of any sub-division of a district, or who is specially authorized by Government to receive such cases." The Legislature must have intended that section 20 of Act VI. of 1862 (B. C.) should be construed as if an alternative choice was given to the parties, otherwise the word *or* would scarcely have been used (which can only bear an alternative signification) throughout the whole of the section. Therefore it is clear that a party can bring a suit for rent, either in the revenue office of the district, or in the revenue office of the sub-division in which the cause of action has arisen.

Again, even if the suit has been brought in the revenue office of the sub-division, the Collector, if he desires, has the power, under the proviso of section 20 of Act VI. of 1862 (B.C.), to withdraw the suit from the Deputy Collector, to try it himself, or refer it to another Deputy Collector.

The judgment of the Full Bench was delivered as follows by—

Couch, C.J.—When this regular appeal came before us for decision, after hearing the argument on both sides, we considered it necessary to refer, for decision by a Full Bench, the questions whether, under section 20 of Act VI. (B.C.) of 1862, a suit, under that Act and Act X. of 1859, may be preferred in the revenue office of the district where a sub-division of a district has been placed under the jurisdiction of a Deputy Collector, or can only be preferred in the revenue office of the sub-division in which the cause of action has arisen; and whether, when a suit has been preferred, not in the revenue office of the sub-division in which the cause of action arose, but in the revenue office of the district, and was referred by the Collector to another Deputy Collector, the decree in such a suit is void for want of jurisdiction.

A decision upon these questions was quoted from 3 Bengal Law Reports, p. 366,* with which at the time we were not prepared to agree. I propose now in the first place to deliver the judgment of the Full Bench upon the questions referred.

They have been considered by the learned Judges who sat in the Full Bench, and what we now say is on behalf of the whole Court, it not being convenient that all the Judges should meet merely for the purpose of delivering the judgment.

The answer to the questions depends upon the construction of section 20 of Act VI. of 1862. It says that suits under that Act or under Act X. of 1859 shall be preferred in the revenue office of the district, or, when a sub-division of a district has been placed under the jurisdiction of a Deputy Collector, in the revenue office of the sub-division in which the cause of action shall have arisen; or, when the cause of action shall have arisen within the limits of the local jurisdiction of any Deputy Collector, not in charge of a sub division, but who has been specially authorized by Government to receive such suits, then in the office of such last-mentioned Deputy Collector.

The words "or when a sub-division of a district has been placed under the jurisdiction of a Deputy Collector" might possibly be construed, so as to give to a person an option of preferring the suit, either in the revenue office of the district, or in the revenue office of the sub-division. The section might have been more clearly worded; but, although the words are capable of that construction, we think that the more reasonable construction is that, where there is a sub-division of a district placed under the jurisdiction of a Deputy Collector, it was intended that the suit should be brought in the revenue office of the sub-division, and the person bringing the suit was not to have an option of bringing it in the revenue office of the district or of the sub-division. And any inconvenience, either public, or to the suitor, might be prevented by the exercise of the power that is given in the proviso which follows:—That the Collector may withdraw any suit from any

* 12 W. R. 310.

Deputy Collector, and try it himself, or refer it to another Deputy Collector. It is more reasonable to suppose that the Legislature, with this power given to the Collector, did not intend to give a discretion to the person bringing the suit as to which office or Court he should bring it in. It prescribed a fixed rule for him. There might be some inconvenience in leaving it to the person bringing the suit arbitrarily to select in which Court it should be brought. Although the words may admit of that meaning, we think upon the whole that the other is a more reasonable construction and more convenient, having regard to the power which we have noticed of withdrawing the suit. So far we concur with the decision in 3 Bengal Law Reports, and would say that the suit cannot be preferred in the revenue office of the district where there is a sub-division under the jurisdiction of the Deputy Collector.

Then the other part of the question has to be considered, namely, whether, when a suit has not been preferred in the revenue office of the sub-division in which the cause of action arose, but has been preferred in the revenue office of the district, and been referred by the Collector to another Deputy Collector, the decree in the suit is void for want of jurisdiction. This is a very different question, and in considering it we must look at the facts of the case in which it arose.

The case of the plaintiff in the suit in which this regular appeal is brought, is that he was a mortgagee of certain property, and that he had foreclosed his mortgage, and so became entitled to the mortgaged property. But he alleged that a suit had been brought in the Court of the Deputy Collector of Alipore, and a decree obtained in the suit collusively, as he apparently alleged, and the property had been sold under decree, and purchased by some of the defendants, the zemindars. And in that way his rights under the decree of foreclosure had been interfered with, and he had not been able to enforce it. And he prayed the Court to declare his right to the mortgaged property which he had under the foreclosure, and to award possession. It having been found by the Judge of the District Court that there was no collusion in bringing the suit in the Court of the Deputy Collector of Alipore, he made in appeal an objection, which had not been prominently put forward in the first Court, that the decree of the Deputy Collector was void for want of jurisdiction, and consequently no title could be made through the sale under it. So the question which we have to decide is whether the decree is void for want of jurisdiction.

In considering this, it is important to keep in mind that the Revenue Courts have a general jurisdiction to entertain suits of this description. The section of Act VI. of 1862 is not one which gives the jurisdiction; but it is rather one which directs how it shall be exercised by the different Courts. Looking at it in that light, it may be that the defendant, in a suit for rent, or a suit brought under Act X., can, if the suit is brought in the revenue office or Court of the district, when it ought to be brought in the revenue office of the sub-division, object to it, and claim to have the directions of section 20 obeyed, and the suit brought in the proper Court. And he may take that objection even in a special appeal, although it may not have been raised in either of the lower Courts. For, from the facts found by the lower Courts, it would appear that the suit had been brought in the wrong Court. Perhaps it might not be right to allow it to be taken if it had not been raised before. But it is one thing to say that the defendant may take the objection that the decree was obtained in the wrong Revenue Court, and that it is voidable on appeal; and another, that a person, not a party to this suit, and who seeks, as this plaintiff did, to altogether avoid the decree and the title derived from it, should be able to take it, and to say that the proceedings are absolutely void. We think, considering that the Revenue Courts have a general jurisdiction, that a person, not a party to the suit, cannot be allowed to say that the proceedings are absolutely void, because the direction of section 20 of Act VI. of 1862 has not been followed. We should answer the second part of this question by saying that the decree in such a suit is not void for want of jurisdiction, but is voidable only at the instance of the defendant. This will make the decision in 3 Bengal Law Reports, p. 366, consistent with our opinion. There the objection was taken in a special appeal and by the defendant in the suit. It would be carrying the doctrine very much further to hold that the proceeding is entirely void. And the consequences would be very serious; for it appears that, in 24-Pergunnahs and probably in other districts, suits have been brought in this manner, honestly and *bonâ fide* brought; and decrees have been obtained in them. No doubt, many titles depend on the validity of sales under such decrees.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 19th November 1873.

Present :

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

High Court—Jury—Verdict—Reference—Act X. of 1872, Section 263.

Reference to the High Court, under Section 263 of the Code of Criminal Procedure, by the Officiating Additional Sessions Judge of Hooghly.

The Queen

versus

Sustiram Mandal, *Prisoner.*

In a case in which the accused was tried on charges of murder, culpable homicide, and causing grievous hurt, the Jury acquitted him of murder, but convicted him on the other counts. This verdict was recorded by the Sessions Judge, who then, in accordance with Section 263, Code of Criminal Procedure, questioned the Jury as to the grounds for their verdict, and the Jury eventually intimated their willingness to convict of murder. The Sessions Judge differed from the 1st verdict of the Jury, but as he had recorded the 1st verdict, he doubted whether he could accept the 2nd verdict, and referred the case to the High Court under the Section 263.

HELD that Section 263 did not apply to such a case as this. There could be no verdict delivered, and no verdict finally recorded, until the last of the questions put by the Sessions Judge to the Jury was answered; and as it appeared from the answers of the Jury that their findings of facts disclosed that the verdict ought to have been one of guilty on the charge of murder, the Sessions Judge should have entered the verdict of the Jury as the verdict of guilty of murder. The case was accordingly returned to the Sessions Judge to enable him to do that, and to pass such sentence as the law directed.

It is only when it is necessary, in order to ascertain what the verdict of a Jury really is, that a Judge is justified under Section 263 in putting questions to the Jury.

Phear, J.—THIS reference has been made to us by the Judge as if under Section 263 of the Criminal Procedure Code. But, on a consideration of the record sent to us by the Judge, we are of opinion that the case does not fall within the provisions of that Section. The Judge records as follows at the termination of the trial :—

"The Judge charges the Jury, who retired "for about half-an-hour, and then came into "Court with a verdict of 'guilty of culpable "'homicide not amounting to murder.' The "Judge asks whether 'the Jury acquit the "'prisoner of murder.' The foreman replies: "'We find him guilty of culpable homicide "not amounting to murder.' The Judge "explains that a verdict is required on each "of the charges; and the Jury, not being "prepared with this, retire again. After a "few minutes, they again return into Court "and give a verdict, and they pronounce the "prisoner—

"(1) Not guilty of murder.

"(2) Guilty of culpable homicide not "amounting to murder.

"(3) Not guilty of grievous hurt.

"The Jurors are unanimous in this verdict.

"*Judge.*—'Are you satisfied that the "'prisoner caused the injuries described by "'the Civil Surgeon to the woman Mohinee?'

"*Foreman, after consulting.*—'We are.'

"*Judge.*—'Are you satisfied that these "'injuries were sufficient, in the ordinary "'course of nature, to cause death?'

"*Foreman and all the Jury.*—'We are.'

"*Judge.*—'Under which of the five excep-"'tions, as explained in my charge, do you "'find that the act falls so as to take it out of "'the offence of murder?' The Jury cannot "answer this question, and the Judge, at their "request, again reads the law to them, and "explains it. The exceptions are finally "read out to the Jurors successively, and "they say that they do not find that any of "these exceptions applies. The foreman "then says that they do not believe the "evidence on the first charge; and again "they intimate their willingness to convict "on the first charge, *i.e.*, of murder. I have "some doubts as to whether I can accept a "verdict of 'guilty' on a charge on which "they have already delivered a verdict of "'not guilty,' which has been recorded. "I think the ends of justice require that I "should submit the case to the High Court, "as I do not agree with the verdict returned. "I remand the prisoner to custody."

The Judge, in addition to the record, sends up the reasons for which he does not agree with the verdict of the Jury, treating the verdict of the Jury to be "guilty of culpable homicide not amounting to murder, and not guilty of murder."

Now, we observe that the questions which the Judge put to the Jury were so put under the provisions of Section 263 of the Criminal Procedure Code, which says:—

"The Jury shall return a verdict on all "the charges on which the accused is tried, "and the Court may ask them such questions "as are necessary to ascertain what their "verdict is; such questions and the answers "to them shall be recorded."

The Judge must, therefore, in this case, have supposed that the first answer given by the Jury to himself did not accurately carry with it the verdict of the Jury on the facts; and under the peculiar circumstances of this case, shown particularly by the Jury requesting the Judge to re-read the exceptions to them, he seems to have been right in so thinking. It is only when it is necessary, in order to ascertain what the verdict of the Jury really is, that the Judge is justified under this Section in putting questions to the Jury. Unless a necessity of this kind truly exists, the questions are not justified in law. No doubt, the Legislature thought that it would be very dangerous to give the Sessions Court the power of cross-examining the Jury after they had delivered their final verdict, with a view to show that the conclusions at which they had arrived were not logical or were inconsistent, or in order to provide materials upon which the Judge might be enabled afterwards to dispute the finality of the verdict. But in this instance it does appear, from the answers which the foreman returned upon being asked to give the verdict of the Jury on the first charge, that there was at the time some lurking uncertainty in the minds of the Jury themselves with regard to their verdict; and we think that this uncertainty in their minds made itself apparent to the Judge, and that, therefore, on the whole, the questions which were put by him were rightly put within the discretion vested in him by Section 263. This being so, there was no verdict delivered, and there could have been no verdict formally recorded until the last of the questions was answered. And it is very clear that, upon the finding of facts which the answers of the Jury taken together disclose, the verdict ought to have been a verdict of guilty on the first charge, namely, the charge of murder. The Jury, through their foreman, and indeed apparently through their own voices also, say that they were satisfied that the prisoner inflicted the injuries which were described by the Civil Surgeon as injuries inflicted on Mohinee. They further say that these injuries were sufficient, in the ordinary course of nature, to cause death. They also say that they did not find that any of the five exceptions appended to the definition of murder in the Penal Code could cover this case. This being their view of the facts, it then became incumbent upon the Judge, as a matter of law, to direct the Jury to find a verdict of guilty of murder. The first clause of Section 257 of the Criminal Procedure Code says that: "It is the duty of the "Jury (1) to decide which view of the facts "is true; and then to return the verdict which "under such view, ought, according to the "direction of the Judge, to be returned." On the view of the facts, which the Jury, in their answers, decided was the true view, it was the duty of the Judge to direct them to find the prisoner guilty of murder. The Judge did so direct the Jury: and the Jury, according to this record, ultimately said that they were willing to return that verdict. But the Judge refrained from recording it, because he was under the impression that a final verdict had previously been given by the Jury which was not in his power to alter. We have already pointed out that, if that were the case, then his questions would not have been rightly put under the provisions of the Procedure Code. We therefore think that, in this case, the Judge ought, as the record stands, to have entered the verdict of the Jury as the verdict of guilty of murder: and, therefore, the case must be returned to the Sessions Court, in order that the Judge may make that entry, and then pass such sentence as the law directs.

The 20th November 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Breach of the peace—Possession—Act X. of 1872, Section 491.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Rungpore.

The Queen

versus

Protab Chandra Barooah, *Petitioner.*

Mr. R. T. Allan and *Baboo Tarinee Kant Bhuttacharjee* for the Petitioner.

Where a Magistrate found that an order of his predecessor, made two years previously, with regard to

possession of certain land, had not been complied with, he enforced the order, and changed the possession in accordance with that order.

HELD that the Magistrate ought, under Section 491, Code of Criminal Procedure, to have maintained the possession which he found, even if it was inconsistent with his predecessor's order, and that he ought not to have taken any steps in the matter, unless some one actually in possession, and guaranteed possession by that order, came to complain to him that his possession was threatened, or that he had just been forcibly turned out, and asked, in pursuance of that order, to be maintained in possession.

Phear, J.—We think that the Judge is substantially right, and that the evidence which was taken by the Magistrate was not sufficient in law to support the adjudication, if, indeed, an adjudication has been made, to the effect that the petitioner was likely to commit a breach of the peace, or to do an act that might probably occasion a breach of the peace. It seems to us that the action taken by the Magistrate in this matter, although, no doubt, thoroughly well-intentioned, has been, on the whole, unfortunate. The witnesses who were examined before him speak very clearly, indeed, to one state of things, namely this, that for some time past, for many months, at any rate, before the date of the inquiry, the Barooah ryots had been in possession of the chur, which is the subject-matter of this vexation; and they further say that, when they themselves, the Bhitarbund people, endeavoured to go upon the land, and to assert their rights to it, they were driven off by the Gowalparah people. The petitioner in this case is the Gowalparah zemindar. There can be no sort of doubt that, in the state of things to which the witnesses deposed, there is exhibited no intention, no disposition, on the part of the Gowalparah zemindar to commit an overt act towards the breach of the peace. If his people were let alone by the Bhitarbund people, they would keep the peace, as well as other good subjects of Her Majesty would keep it. The cause of the different encounters and the different acts of violence which are spoken of by the witnesses seems to have been, on all occasions, an endeavour on the part of the Bhitarbund people to get that which they thought they had been deprived of by the Gowalparah people. If there was a different state of things at the time when the Magistrate made his order against the petitioner, it was caused by something which happened entirely subsequent to the state of things to which the evidence is directed—caused, in truth, by the very act of the Magistrate himself, done on the morning of the 15th. It seems that, two years previously, his predecessor in office had made an order under Section 318 of the old Criminal Procedure Code, whereby he declared that the Bhitarbund people were in possession of this chur, and ought to be maintained in possession. But, at the time of the present enquiry, the Magistrate found that his predecessor's order had not, for some reason or other, been complied with; or, as he seems to call it, carried into execution. So he felt bound to put it in execution himself; in other words, before making his adjudication in the present matter, on the very morning of the day when he did make that adjudication, he went to the spot, and turned the Gowalparah people out, and put the Bhitarbund people in. Having effected this change of things, his view seems to be that, no doubt, the Gowalparah people, whom he has thus turned out, will not quietly sit down under their discomfiture; and that, on the occurrence of the first opportunity, the petitioner will certainly commit a breach of the peace by endeavoring to recover possession. This view may possibly be correct. Still this supposed intention to commit a breach of the peace is something entirely speculative on the part of the Magistrate, and is not indicated by, or apparent as naturally arising out of, the state of things which the witnesses, who were examined by the Magistrate, deposed to; if it exists, it has been originated or brought about by the act of the Magistrate himself. But, after all, even if the Magistrate's provocation be added to the witnesses' facts, it remains pure conjecture that the petitioner entertains the intention or disposition which is attributed to him; for it does not necessarily follow that, because the Gowalparah people, when they were in possession, used force to maintain their possession against intruders, therefore the Gowalparah zemindar will use force to recover possession after his people have been turned out by show of legal process at the hands of the Magistrate. His vakeel said that there was no chance of his taking a step of this kind, and that he would be content to use the means of obtaining relief which the law provided for him. And it seems to be mere speculation, even if the fact that the Magistrate had turned the Gowalparah people out, and put the Bhitarbund people in, be considered with the rest, to conclude that, therefore, the Gowalparah zemindar must be actuated with the intention of committing a breach of the peace as soon as he had opportunity of doing so with effect. There is no evidence of the petitioner having done anything, or behaved in

such a way as to lead to that conclusion. We may add that, on the facts which were deposed to by the witnesses, and which the Magistrate seems to have entirely accepted, it was his duty not to change the possession which he found to be an accomplished fact, but to maintain that possession, even though it were that of the Gowalparah people, and inconsistent with his predecessor's order. It was not his business to judge whether his predecessor's order had been fully complied with or not, unless some one actually in possession, and guaranteed possession by that order, came to complain to him that his possession was threatened, or that he had just been forcibly turned out, and asked, in pursuance of that order, to be maintained in possession. That was not the case here in any sense whatever; and the Magistrate, as he himself says, actually changed the possession; he found one set of people in possession, he turned them out, and put another set of people in. He further might, of course, be entirely right in his opinion that the Gowalparah people's possession of the chur was wrongful; and he might be very naturally led to think so from the fact that, two years before, his predecessor had found the other people in possession. However that might be, it was not his business to judge of the rightfulness or wrongfulness of the possession; it was his duty solely to maintain the peace; and if the peace was broken, as it seems to have been, as a consequence of the continued endeavour of the Bhitarbund people to get possession of the chur which was already occupied by the Gowalparah people, he should have insisted upon the Bhitarbund people keeping the peace. Unfortunately, he thought that the right thing to do was to give effect to the order of his predecessor, made two years before, by turning the Gowalparah people out, and putting the Bhitarbund people in. Having done this, he further thought, with possibly some ground of probability, that the Gowalparah people would not acquiesce in the altered state of things. But this is something very different from that which he was called upon to do under Section 491 of the Criminal Procedure Code.

We repeat, then, that we think that the Judge was right in his view that the evidence taken by the Magistrate was not sufficient in law to support the adjudication, and that, therefore, the order of the Magistrate must be quashed.

The 20th November 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

High Court—Jury—Reference—Act X. of 1872, Section 263.

Reference to the High Court, under Section 263 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Hooghly.

The Queen

versus

Haroo Manjhee, *Prisoner.*

In a case referred under Section 263, Act X. of 1872, the High Court declined to interfere with a verdict of a Jury from which the Sessions Judge disagreed, as the verdict was not clearly and patently wrong, and unsustainable on the evidence.

Phear, J.—In regard to this reference made to this Court under the provisions of Section 263 of the Criminal Procedure Code we may say that we entirely concur in the opinion lately expressed by this Court in a recent case,* namely, "that the powers given "to this Court by Section 263 are not to be "lightly exercised; and that the unanimous "verdict of a Jury ought not to be set "aside, even if the Sessions Judge disagrees "with it, unless that verdict is clearly and "patently wrong, and unsustainable on the "evidence." It seems to us that the verdict in this case, with which the Sessions Judge disagrees, cannot be said to be "clearly and patently wrong, and unsustainable on the evidence." If the statement which was made by the prisoner in Court is true, and the Jury have, no doubt, believed that it was true (indeed, according to the reference made to us by the Judge, they informed him that they did so), then their verdict was probably right in fact. We, therefore, think that there is not sufficient reason to interfere with the verdict which they gave. That verdict will consequently stand, and the record must be sent back again.

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* 20 W. R., Crim., 70.

The 28th November 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Confession—Certificate—Evidence—Act X. of 1872, Section 249—Act I. of 1872, Section 80.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of committing culpable homicide not amounting to murder.

The Queen

versus

Nussuruddin and another, *Appellants.*

Baboo Bhoobun Mohun Doss for the Appellants.

The confession of a witness in the shape of a former deposition can be used as evidence against a prisoner only on the condition prescribed by Section 249, Code of Criminal Procedure; that is, it must have been duly taken by the committing officer in the presence of the person against whom it is to be used. The certificate of the Magistrate appended to such confession, in order to afford *primâ-facie* evidence, under Section 80 of the Evidence Act, of the circumstances mentioned in it relative to the taking of the statement, ought to give the facts necessary to render the deposition admissible under Section 249.

Phear, J.—The judgment of the Sessions Court has been placed mainly upon the so-called confessions of Boloo (witness No. 1), and of Osman, the first prisoner. But it does not appear to us that either of these confessions has been properly made evidence before the Court. The confession of Boloo could be only used as evidence against the prisoners as far as it existed in the shape of a former deposition made by him as a witness, and then only under the conditions prescribed by Section 249 of the Criminal Procedure Code. Those conditions are: that it must have been duly taken by the committing Magistrate in the presence of the accused person, that is, the person against whom it is to be used. Now, although a document purporting to be the deposition of Boloo, made before a Magistrate, appears on the record, there is no evidence, as far as we can see, to prove that this document exhibits evidence of this witness duly taken by the committing Magistrate in the presence of any of the persons who were tried in the Sessions Court, and against whom it was used. A certificate is, no doubt, appended to it, initialled by some person, and on the supposition that this person was a Magistrate that certificate would, under Section 80 of the Evidence Act, afford *primâ-facie* evidence of the circumstances mentioned in it relative to the taking of the statement, &c. But this certificate is merely in these words—"Read to deponent, and admitted correct," and does not give any of the facts necessary to render a deposition admissible under Section 249 of the Criminal Procedure Code. Moreover, if it did state these facts, still, inasmuch as Boloo, when examined as a witness before the Sessions Court, and asked about this alleged deposition, denied that it was the deposition made by him, the presumption allowed by Section 80 of the Evidence Act could not be made; and it became necessary, in order to render the deposition admissible under Section 249 of the Criminal Procedure Code, to show by direct testimony that the conditions of that Section had been satisfied.

Again, the paper-writing termed the confession of Osman, one of the prisoners, who has been convicted, could not be used even against himself, unless it was proved by sufficient evidence that the contents of it correctly represented a statement actually made by him (Osman) to some one on some specified occasion. If the certificate required by Section 346 of the Criminal Procedure Code had been attached to it, this would have been sufficient evidence for the purpose as against Osman. But there is no such certificate; and we are unable to find any evidence to the necessary effect upon the record. At the same time, it appears probable that the requisite evidence for the purpose of properly placing these two documents upon the record is obtainable by the Sessions Court. It can hardly be doubted that the deposition of Boloo before the committing Magistrate, if it was made as alleged, is capable of being proved. And the confession of Osman, inasmuch as it appears in a written form, must have been taken down by somebody; it is, therefore, not unreasonable to suppose that the Sessions Court has it in its power to cause this document also to be legally proved.

Under these circumstances, and for the purpose of completing the present trial, we think it right to send back the record to the Sessions Court, in order, first, that it may take, in the presence of the prisoners, such additional evidence, if it can be obtained, as may serve to prove, within the terms of Section 249, the so-called deposition of Boloo, which was put into his hand by the Sessions Judge. And, secondly, that the Sessions Court may take also in the presence of the prisoners the testimony of any person who can say that he actually heard the words,

which are contained in the alleged confession of Osman, uttered by the prisoner Osman himself. At the same time, the Sessions Court must allow the prisoner's liberty to cross-examine the witnesses who may be thus called to prove these documents, and also to adduce any evidence which they may desire bearing upon the question whether the deposition and confession, respectively, were made as alleged; and, if made, upon the circumstances under which they were made.

After this evidence shall have been taken by the Sessions Court, the Judge will return the record with the additional evidence to this Court.

The 29th November 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Breach of the peace—Notice—Act X. of 1872, Section 491.

(Miscellaneous Case.)

Ramkissore Acharjee Chowdhry, *Petitioner,*

versus

Arip Khan, *Opposite Party.*

Baboo Kishen Doyal Roy for the Petitioner.

To constitute a proper foundation for an order under Section 491 of the Code of Criminal Procedure, it is necessary that the Magistrate should adjudicate upon legal evidence before him that the person against whom the order is made is likely to commit a breach of the peace, and the Magistrate should give notice to the party who is to be affected by the order of the particular conduct on his part which is complained of.

Where such notice was given, and the ground of complaint to which such notice had reference was found by the Magistrate to be unfounded, it was held that the Magistrate could not proceed to adjudicate that an entirely different ground existed, upon which it was likely that the party charged would commit a breach of the peace.

Phear, J.—We are of opinion that material error has been committed by the Magistrate in these proceedings, and that, consequently, the order which he has made cannot be allowed to stand. That order was made in exercise of the power conferred upon the Magistrate by Section 491 of the Criminal Procedure Code; and to constitute a proper foundation for an order under that Section, it is necessary that the Magistrate should adjudicate upon legal evidence before him that the person against whom the order is made is likely to commit a breach of the "peace, or to do an act that may probably "occasion a breach of the peace." And it is further necessary, as a step in the proceedings which are to lead up to such an adjudication, that the Magistrate should give notice to the party who is to be affected by the order of the particular conduct on his part which is complained of, and is indicative of an intention or disposition to commit a breach of the peace, or to do an act that may probably occasion a breach of the peace. Section 491 directs that the person should be summoned to show cause why such an order should not be made against him: and Section 492 explains that "such summons "shall set forth the substance of the report "or information on which it is issued." In this instance, it appears that the information upon which the summons was issued was in the form of a complaint made by a ryot, who said that the present petitioner and others, whom together he called the 14-annas shareholders, were collecting, or endeavouring to collect by force, a certain illegal cess, or making with show of force certain illegal demands. And this information, so given by the ryot, was stated in the summons, under which the present petitioner was called upon to show cause why the order should not be made against him, as the ground upon which the summons was issued. When the parties eventually came before the Magistrate in consequence of, or after the issuing of, the summons, and had been heard in the matter, the Magistrate arrived at the conclusion that the complaint of the ryot was entirely unfounded; and he ought, then, to have terminated the matter altogether by refusing to make any order. The particular ground originally put forward for supposing that the petitioner was likely to commit a breach of the peace, or to do any act which might probably occasion a breach of the peace, having thus failed, he ought not to have been affected by an order of such a character as that which has been passed against him, without having afforded him anew a full and complete opportunity of meeting and answering any further ground which, in any sufficient way, may have since shown itself for still suspecting that he was likely to commit a breach of the peace. This course, however, was not taken by the Magistrate, but simultaneously almost with expressing his opinion to the effect that the complaint of the ryot had come to nothing, he says: "The facts of this case appear "very clearly in the answers of Pachoo "Baboo and Gunga Gobind, and the

evidence supports their answers. It appears that Pachoo Baboo has, or believes he has, a claim of proprietorship in certain parts of the property bought by him and others from Mr. Wise, and he has accordingly taken possession of the 16 annas to the entire exclusion of those who purchased with him. The title he asserts may or may not be good, but having bought the property, he was bound either to get his co-partners to agree, or to oust them by due course of law. He has not done so, but has taken possession by force; and if the other sharers try to collect, there would doubtless be a riot. I do not see, either in Pachoo Baboo's answer or in the evidence, anything to induce me to take security from the other sharers. The aggression appears to be entirely on Pachoo Baboo's side, and the evidence now heard also induces me not to insist on the security from Mohim Baboo.

"I accordingly discharge the other defendants, and order Pachoo Baboo to give Rs. 10,000 personal security, and Rs. 10,000 bail to keep the peace for one year."

Thus, having judicially come to the conclusion that the ground formally alleged for expecting it likely that the present petitioner would commit a breach of the peace had disappeared, the Magistrate, in substance, proceeds to adjudicate that an entirely different ground exists, upon which it is likely that the petitioner will commit a breach of the peace. This ground is perfectly distinct from, and in some respects antagonistic to, that upon which the proceedings were originally started. And it is, we think, a material error in the proceedings taken by the Magistrate that he thought that this ground existed without having previously furnished the petitioner with distinct notice of it, and given him an opportunity, according to the terms of Section 491 and the following Section of the Procedure Code, to meet and rebut it, if he thought there was reason for doing so. But it seems to us that, even if the course of proceeding taken by the Magistrate could be in all respects justified, there still does not exist in the evidence, which is now upon the record, sufficient to support the conclusion of fact at which the Magistrate arrived. He says that, under the circumstances which existed as between the petitioner and his co-sharers, "he was bound "either to get his co-partners to agree, or to "oust them by due course of law. He has "not done so, but has taken possession by "force." We are quite unable to discover in the record any evidence of action of this kind on the part of the petitioner. It seems that (perhaps in anticipation of like steps on the part of his co-purchasers) he succeeded in getting possession of 16 annas, *i.e.*, exclusive possession, at any rate, of some portion of the property. But there is nothing to show that they at any time were in possession thereof before he did so, or that he disturbed them in their possession in any way; still less to indicate that he used force for this purpose. And the Magistrate goes on to say: "And if the other sharers "try to collect, there would doubtless be a "riot." In other words, because the petitioner is now exclusively in possession, it is very likely that, in the event of other persons endeavouring to disturb him in it, he would resist them. We think that, even if that anticipation is well-founded, as, no doubt, it is possible that it may be, it does not constitute a reason in law for coming to the conclusion that the party who is thus in exclusive possession is likely to commit a breach of the peace. It is rather a reason for thinking that the parties who are out of possession, and who are possessed with the intention of invading and disturbing the petitioner's possession, are likely to commit a breach of the peace. The Magistrate's conclusion, in truth, effects a complete turning of the table upon the unfortunate petitioner, on the supposition that the facts are as the Magistrate seems to find that they are.

Again he says:—

"The aggression appears to be entirely on "Pachoo Baboo's side, and the evidence now "heard also induces me not to insist on the "security from Mohim Baboo." We find it exceedingly difficult to understand how the Magistrate satisfied himself with this reasoning. We have already remarked that there is not on the record, as far as we can discover, a particle of evidence to show aggression on the part of Pachoo Baboo as between him and his co-sharers. The only evidence of any action on his part is the evidence of his conduct as between himself and the ryots—the conduct which the Magistrate, at the outset, had spoken to.

We have thus far assumed that the deposition made by the ryot, before Pachoo Baboo or the other parties accused had appeared in the matter at all, was, upon the case coming on for hearing, properly laid before Pachoo and other persons, and that Pachoo Baboo had the opportunity of meeting it, or asking that the ryot should be re-examined. There is, however, no statement

to this effect upon the record; and if opportunity of this kind was not given to the accused person, we think that the proceedings would be bad even on that account alone, for it is clearly the intention of the Legislature, as expressed in the Explanation 1 of Section 491, that no adjudication should be come to against the person concerned, excepting upon evidence taken either in his presence, or which he had at least an opportunity of knowing and rebutting.

On the whole, for the reasons which have been given, we think that this order is bad in law, and ought to be set aside. The sum of Rs. 10,000, that has been paid in under this order, must be refunded.

The 1st December 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Abetment.

Committed by the Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of abetting the offence of murder.

The Queen

versus

Imamdi Bhooyah, *Appellant.*

Mr. R. T. Allan and *Moonshee Serajul Islam* for the Appellant.

Baboo Juggadanund Mookerjee for the Prosecution.

The offence of abetment by instigation depends upon the intention of the person who abets, and not upon the act which is actually done by the person whom he abets.

Phear, J. Without, at this stage, expressing any opinion upon the facts of the case, we observe that, according to the finding of the Judge, the prisoner at the most instigated his followers or servants to inflict hurt or grievous hurt upon the unfortunate deceased. The Judge appears to say distinctly that, if it had not been for the circumstance that Kaloo had already been convicted of the offence of murder, he should not have found that Imamdi had abetted, or rather intended to abet, any higher offence than that of committing grievous hurt. The fact seems to be that, when Mungul came to Imamdi's boat, and laid hold of it, exclaiming, at the same time, "Imamdi is in the boat, come quick," Imamdi called out to his men, "Here is a spy, beat him;" and the Judge thinks that he did not intend by these words or by his actions to instigate his people to do anything more at the most than inflict grievous hurt. Now, clearly the offence of abetment by instigation depends upon the intention of the person who abets, and not upon the act which is actually done by the person whom he abets.

The real question in this case is, what was the offence which Imamdi committed—not what was the offence which the convicted man Kaloo committed. Now, if, as the Judge thinks, Imamdi only instigated his servant to drive off Mungul by force (possibly to prevent him from entering into the boat), it is possible that this conduct on the part of Imamdi might not be criminal, even though Kaloo committed murder. If he was merely defending his own boat from the attack or intrusion of a stranger, *i.e.*, a person having no lawful authority to invade it, he would have been justified in law in using reasonably sufficient force in reason to effect that object. Almost everything, then, in this case turns upon the question whether or not Mungul and those people who were acting with him, namely, the constables, had authority to arrest Imamdi, and for that purpose, if necessary, to break into his boat, and apprehend him there. But unfortunately there is no evidence whatever on the record, at present, to show whether Mungul and the constables had any lawful authority to arrest Imamdi. This is a strange omission for the prosecution to have made in this case, but it is one which, we think, we ought, in the interest of the public, to give them an opportunity of supplying. We suppose that it is within the power of the prosecution even now to obtain the evidence of the constables under whose direction Mungul was acting, or, at any rate, to give some evidence as to whether or not these persons had a warrant or other authority in law to arrest Imamdi. For this purpose, we direct the record to be sent back. Let the evidence of the constables, or such other persons as can speak to this fact, and can produce the warrant of arrest, if there was one, be taken by the Sessions Court in the presence of the prisoner, and let the prisoner be afforded an opportunity of rebutting that evidence, if he desires to do so. When this evidence shall have been taken, the Court will certify it to this Court under the provisions of the Criminal Procedure Code, and also return the record to this Court.

The 18th November 1873.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Abetment—Punishment—Public servant—Civil Surgeon—Act XLV. of 1860, Sections 116, 161.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensingh, on a charge of abetting the taking by a public servant of a gratification other than a legal remuneration in respect of an official act.

The Queen

versus

Ramnath Surma Biswas, *Appellant.*

Baboo Doorga Mohun Dass for Appellant.

Where the accused was charged, under Section 116, Penal Code, with having abetted the commission of an offence punishable under Section 161 of that Code, the person abetted having been a Civil Surgeon of a sudder station, it was held that the enhanced imprisonment prescribed by the latter part of Section 116 could not be awarded, as the Civil Surgeon was not a public servant within the words of the Section, "whose duty it is to prevent the commission of such offence."

Phear, J.—We think, on a review of the evidence, that we ought not to disturb the verdict of the Sessions Court. But we are of opinion that the sentence is somewhat unnecessarily severe. Indeed, as regards one portion of it, namely, the imprisonment, it exceeds the limit within which the law confines the jurisdiction of the Sessions Court. Section 116 of the Penal Code says: "Whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence, for a term which may extend to one-fourth part of the longest term provided for that offence, or with such fine as is provided for that offence, or with both." * * * *

The offence which the prisoner in this case is convicted of having abetted is the offence specified in Section 161 of the Penal Code; and under that Section the limit of imprisonment which can be inflicted for the original offence is three years. One-fourth of that term is, therefore, nine months—a period less than twelve months, which has been the sentence passed in the present case.

The second-half of Section 116, no doubt, says: "And if the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both."

And in the present case, it is true that the person abetted is a public servant, because he is the Civil Surgeon of Mymensingh Station; but he is not a public servant "whose duty it is to prevent the commission of such offence." His duty as a public servant is to act in the way of his profession, that is, the profession of a medical man. It is not his duty to prevent the commission of the particular offence of bribing any further than it is the duty of every good citizen to do what he can to keep people about him honest, and to prevent the commission of any offence whatever. Cases might be readily supposed to which this latter half of the Section would directly apply; for instance, it is the duty of a custom-house officer to prevent fraud upon the revenue in the way of smuggling; and, consequently, abetting him in the commission of such a fraud would be abetting the commission of an offence by a public servant, whose duty it is to prevent the commission of such offence. It is not, however, the special duty of the Civil Surgeon as public servant to prevent the commission of the offence of bribing. Therefore, this latter portion of the Section does not apply to the present case, and the punishment which is to be inflicted must be measured according to the provisions of the first part. It was, consequently, not competent to the Sessions Court to pass a sentence of imprisonment exceeding the term of nine months.

On the whole, we are of opinion that even nine months would be unnecessary in the present case; and the addition of a fine of Rs. 500, which is a very large sum, indeed, to a person in the position of the accused, is quite beyond the requirements of justice. The case is clearly one in which the extreme punishment allowed by law is not needed. No bribe was actually offered. The prisoner was, at the most, only feeling his way, when he was very properly stopped by the Civil Surgeon. We think that six months' rigorous imprisonment without fine is sufficient for the merits of the case. Accordingly, we set aside the sentence which has been passed by the Sessions Court, and in lieu thereof direct that the prisoner do undergo six months' rigorous imprisonment.

The 1st December 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges*.

Obstruction—Nuisance—Act X. of 1872, Sections 521, 526.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Backergunge.

Kashi Chunder Chuckerbutty

versus

Yar Mahomed.

Section 526, Code of Criminal Procedure, does not enable a Magistrate to make any orders except such as are mentioned in Section 521, under which he can only deal with existing obstructions; the Magistrate has no power to direct what is to be done in the case of any future obstruction.

Reference.—In this case, it appears to me that the final order of the Deputy Magistrate was illegal, and that it ought to be set aside as such. In consequence of a complaint that a certain khal used as a thoroughfare for boats had been obstructed, the Deputy Magistrate issued an order under Section 521, Code of Criminal Procedure. The opposite party appeared to show cause against it, and claimed a Jury. The Jury was appointed, and reported that the alleged obstructions no longer existed, and that the khal, if kept open, and if the sides were raised, would be of great advantage to the neighbouring villages. The Deputy Magistrate then, instead of enforcing the original order, which was what he might have done if the Jury had declared it reasonable, issued under Section 526 an entirely fresh order to prevent future obstructions, and to authorize any party interested to raise the banks of the khal. It seems to me that this order was not warranted by law, as it is not one coming under Section 521, and which only could be enforced under Section 526.

Judgment of the High Court.

Markby, J.—This order is one which the Deputy Magistrate had no power to make. Section 526 does not enable the Magistrate to make any orders except such as are mentioned in Section 521; and, under Section 521, the Magistrate can only deal with existing obstructions; whereas it has been found in this case that no obstruction exists. The Magistrate has no power to direct what is to be done in the case of any future obstruction.

The 4th December 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges*.

Fraudulent transfer of property—Act XLV. of 1860, Section 424.

(Miscellaneous Case.)

Gour Benode Dutt and another, *Petitioners.*

Mr. T. D. Ingram and *Baboos Poorno Chunder Mookerjee* and *Sham Lall Mitter* for Petitioners.

The offence which Section 424 of the Penal Code contemplates is such a concealment or removal of property from the place where the property is deposited as can be considered fraudulent, whether the fraud is intended to be practised on creditors or partners.

Case in 15 W. R., Cri., 51, distinguished.

Markby, J.—The prisoners in this case have been convicted of dishonestly removing certain account-books under Section 424 of the Indian Penal Code. It appears that the books in question were books of account belonging to a partnership, and I will assume, for the purposes of this case, that the Magistrate has found that the prisoner Gour Benode Dutt was a partner in the business, and, therefore, as a partner, the books will be the property of himself jointly with his co-partners. The books were kept at the head-quarters of the firm at Cutwa, and were removed by the prisoners at night. There had been some disputes between the members of the firm, and, upon the removal of the books being made the subject of a charge against the prisoners, they denied having removed the books, and said that it was a false charge got up against them.

Now, it is contended before us that the prisoner Gour Benode Dutt, as being a partner in the concern, and having, therefore, a right to the custody of these books, could not be guilty of the offence under Section 424. It is urged that Section 424 belongs to a class of offences which comprise concealment or removal of property so as to defraud creditors; and, further, that a person could not be guilty, criminally speaking, of removing property of which he himself is the owner. Now, it is not necessary for us to enter into the question whether or no a partner would have a right of removing books of the firm from their proper place of custody, namely,

he place where the business is usually carried on. Assuming that he has such a right, still it appears to us that the case falls within Section 424. It is found that the object of removal was to defraud his co-partners; and there is nothing in Section 424 which would justify us in limiting it, as we are asked to do, to offences in respect of creditors only. The heading of that Chapter is perfectly general—"Of fraudulent deeds and dispositions of property," and the words of the Section are also perfectly general. There is no reason why a man should not be criminally punished for defrauding his partner just as he would be criminally punished for defrauding his creditors, nor is there any reason why a man should not fraudulently remove the property of a partnership just as he may fraudulently remove the property which belongs to himself. There may not have been that particular sort of removal which is necessary to constitute theft; but what we are considering is not whether the prisoners are guilty of theft, but whether they are guilty of an offence under this Section; and the offence which this Section contemplates is such a removal or concealment of property, in other words, such a change of the place in which the property is deposited, as can be considered fraudulent. That having been found to be the case, I see no reason in point of law why this conviction should not stand.

Mr. Ingram is also desirous to go into the facts of the case. I think it would be contrary to the practice of this Court, when the facts have been twice investigated and found against the prisoners, that they should be again re-considered here. Assuming the facts found to be correct, I think that the prisoners are rightly convicted.

I wish to add that, in our opinion, the case which has been referred to in the 15th Weekly Reporter, Criminal Rulings, page 51, is quite distinguishable from the present one. The observations of the Chief Justice in that case, we think, were only intended to apply to the facts of that case, and the charge then under consideration. That was not a charge under Section 424, nor was there any allusion to that Section, but the charge was one of theft under Section 375; and the Chief Justice only says that, if any offence had been committed at all, it certainly was not theft.

The case will, therefore, go back to the Magistrate of the District, who will give necessary orders for carrying out the sentence passed upon the prisoners.

The 4th December 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Abetment—Head-constable—Act XLV. of 1860, Section 107.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of abetment of the offence of causing hurt for the purpose of extorting confession.

The Queen

versus

Kali Churn Gangooly, *Appellant.*

Baboo Aushootosh Dhur for Appellant.

Where a head-constable, who knew that certain persons were likely to be tortured for the purpose of extorting confession, purposely kept out of the way, it was *held* that he was guilty of abetment under the words of Section 107 of the Penal Code, expl. 2.

Markby, J.—In this case, the substance of what the Judge has found is, we think, expressed in these words of the judgment: "That, by keeping out of the way, the prisoner, who was the head-constable or chief police-officer at present, enabled the other police-officers to do what they did, and that he (that is, this prisoner) knew that, while he was out of the way, steps would be taken towards detection of the crime, which he would not countenance by his presence, and which his presence would have prevented." Then, in the subsequent part of the judgment, the Judge says: "I cannot possibly acquit Gangooly, that is, the prisoner, of knowing that, by keeping out of the way, he was giving an opportunity for violence to be had recourse to which would probably be availed of. His omitting to be present with the sufferers, or to keep them under his eye, gave the police the opportunity for violence; the infliction of violence was the consequence, and he knew what would be the probable consequence of his keeping out of the way." Now, the Judge and the assessors having come to that conclusion, the only question for us is whether the prisoner comes within the words of Section 107, which define abetment. That Section says that, "Whoever intentionally aids, by any act or illegal omission, the doing of an offence, is said to abet the doing of that offence;" and the Explanation 2 says: "Whoever, either prior to, or at the time of, the commission of

an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act." It seems to us that the finding of the Judge clearly brings this prisoner within either of these Clauses. He certainly omitted to do that which he was bound to do. It was illegal in him, knowing that an offence of this kind was about to be committed, to go away in order that that crime should be committed. He also, as it is directly found, by withdrawing from the spot, did that which facilitated the commission of this offence. Therefore, his conduct clearly comes within the exact words of both these portions of that Section.

The appeal is rejected. Having read the judgment of the Judge, and having had the facts fully before us, we think that the appeals of the other prisoners (Raj Mohun Singh, Hurry Churn Singh, and Kurimoodee), who have not appeared by Counsel, must also be rejected.

The 5th December 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Evidence—Witness—Cross-examination—Act I. of 1872, Section 33—Act X. of 1872, Section 327.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of dacoity.

The Queen

versus

Etwaree Dharee, *Appellant.*

Section 327 of the new Code of Criminal Procedure, which permits the depositions of a witness to be taken in the absence of an accused person who has absconded, does not apply to a deposition taken before the new Code was passed.

Under Section 33 of the Evidence Act, depositions of an absent witness are only admissible when the prisoner has had the right and the opportunity to cross-examine.

Where Section 327 does apply, it should be shown that, when the former deposition was taken, the accused had absconded, and, after due pursuit, could not be arrested.

Markby, J.—THE depositions of the deceased witness Budhoo have been admitted in the Sessions Court, apparently, under the provisions of Section 327 of the Code of Criminal Procedure (X. of 1872). But we are of opinion that that Section does not apply to depositions taken before the new Code was passed, when the special power conferred by that Section did not exist. Under the old law, as well as under the Evidence Act (Section 33), depositions of an absent witness are only admissible when the prisoner has had the right and the opportunity to cross-examine.

We may also observe that, even had Section 327 applied, it would have been necessary to establish that, when the former deposition was taken, the accused had absconded, and, after due pursuit, could not be arrested: a point to which the attention of the Court does not appear to have been directed.

Excluding, therefore, as we are bound to do, the deposition of Budhoo, we are not satisfied that the remaining evidence is sufficient to support a conviction.

We, therefore, reverse the finding of the Sessions Judge, and direct that the prisoner be acquitted and released.

The 15th December 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Breach of the peace—Bench of Magistrates—Act X. of 1872, Sections 222, 224, 225.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Shahabad.

The Queen

versus

Bebheki Pathak, *Petitioner.*

A Bench of Magistrates, whether empowered under Section 224 or 225, cannot try a case of breach of the peace or any offence except those mentioned in Sections 222 and 225, Code of Criminal Procedure.

Reference.—THIS is an application, under Section 296, Criminal Procedure Code, from the order of Mr. A. H. Haggard, Magistrate of the Buxar Division of the District of Shahabad, sitting with a Bench of Magistrates.

The Bench has found the petitioner guilty of being "likely to break the peace," and has passed the following order: "Defendant bound over to keep the peace for six months in a bond of Rs. 250 under Section 497, Code of Criminal Procedure." This order is evidently illegal. The trial on this charge is not cognizable by a Bench of Magistrates, and therefore cannot come before them.

Though the offence can be summarily tried by a Magistrate of a District, still in these

proceedings there is no summary of the evidence at all, nor have the proceedings been conducted, as would be necessary under a trial for the offence charged.

Thus, the whole proceedings, being illegal and irregular, should be quashed, and the Magistrate be directed to re-try the case according to law.

Judgment of the High Court.

Birch, J.—A Bench of Magistrates, whether empowered under Section 224 or 225, cannot try any offence except those mentioned in Sections 222 and 225, Criminal Procedure Code.

An order to give security to keep the peace must be passed by the Magistrate alone after he has adjudicated upon evidence before him. The proceedings sent up must be quashed as illegal, and the Magistrate can exercise his discretion in instituting a fresh enquiry.

The 15th December 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Prosecutor—Convicted person—Adultery—High Court—Evidence—Trial.

Committed by the Joint Magistrate, and tried by the Officiating Sessions Judge of Hooghly, on a charge of adultery.

The Queen

versus

Madhub Chunder Giri Mohunt, *Appellant.*

Messrs. W. Jackson and *G. H. P. Evans* for the Appellant.

Baboo Juggadanund Mookerjee, Junior Government Pleader, for the Crown.

Mr. W. C. Bonnerjee, for Nobin Chunder Banerjee.

There is no rule that a convicted person cannot institute criminal proceedings.

In a case of adultery, sexual intercourse must be proved; the sexual intercourse required for adultery being the same identical thing as the sexual intercourse required for rape.

It is not necessary that there should be direct evidence of an act of adultery, nor that the adulterer should know whose wife the woman is, provided he knew she was a married woman.

The High Court declined, on appeal, to receive evidence which was available at the trial below, when the prisoner deliberately elected not to give evidence in reply to the case made against him.

Per Markby, J.—It is not the duty of the High Court, in appeal, to try a prisoner *de novo* upon the recorded depositions; the Court is bound, in forming its conclusions as to the credibility of the witnesses, to attach great weight to the opinion which the Judge who heard them has expressed upon that matter.

Markby, J.—In this case, the prisoner is charged, under Section 497 of the Indian Penal Code, with having committed adultery with one Elokeshi, the wife of Nobin Chunder Banerjee.

Nobin Chunder Banerjee is now under sentence of transportation for life for having killed his wife, Elokeshi, on account of her infidelity.

The Sessions Judge has convicted the prisoner, and sentenced him to three years' rigorous imprisonment and a fine of Rs. 2,000. One assessor concurs in this verdict, and the other does not.

The case is one of considerable public importance on account of the position of the prisoner, who is the Mohunt of Tarokeshur, said to be one of the holiest and wealthiest shrines in this part of India. The person with whom he is charged to have committed adultery was a Brahmin woman, married to a husband of the same rank as herself.

The case comes before us on appeal, and I will first dispose of one or two points of law which have been raised in the prisoner's favor.

It is contended that Nobin Chunder Banerjee, being a convicted person, cannot prosecute. This argument is founded on the rule which prevails, or did prevail, in England, that certain infamous persons could not become prosecutors. But though the Criminal Procedure Code speaks of a prosecutor in some cases, there is no prosecutor on a criminal trial in this country in the English sense. The prosecutor in England is the person who prefers the bill of indictment before the Grand Jury, and generally, without his appearance, no bill can be found. But the prosecutor in India is merely the person who, by making a complaint, and by giving information, institutes the proceedings over which, as a general rule, he has subsequently no control, and in which his concurrence is in no way necessary. Whether or no the husband, who has instituted proceedings in adultery, has any control over them subsequently by reason of the provisions of Section 478 of the Code of Procedure, is to my mind a matter of very serious doubt; but it is not necessary to consider it in this case, because there never was any rule, as far as I am aware, that a convicted person could not institute criminal proceedings; and

that is all that, in a case of adultery, the husband is required to do.

Next, it is contended that the husband, after he became aware of his wife's misconduct, condoned the offence, and was thereby incapacitated from instituting these proceedings. No authority has been cited for this contention, nor do I know of any principle on which it could be based.

Another objection was taken that such sexual intercourse as is necessary to adultery was not established. I shall consider hereafter the general effect of the evidence, and what it establishes. What the law in terms requires is that sexual intercourse shall be proved; and the sexual intercourse required for adultery is, in my opinion, the same identical thing as the sexual intercourse required for rape.

Lastly, it was said that evidence had been improperly rejected. The evidence which the Judge was asked to receive was an account of what a person named Mohesh Bharatee had stated as to the custom of females visiting shrines of this description. The witness appears to have absconded, and could not be produced at the trial, and the evidence was tendered under Clause 4 of Section 32 of the new Evidence Act. The Judge, in my opinion, has rightly rejected it; and I may also add that, even if admissible, it would, in my opinion, be absolutely worthless.

Mr. Jackson has also, in this appeal, tendered evidence on behalf of the prisoner, but we declined to receive it. The evidence tendered was available at the trial, when the prisoner deliberately elected not to give any evidence in reply to the case made against him. I think he must abide by that election.

I now come to the more important part of the case, namely, the consideration of the evidence by which the prisoner's guilt is sought to be established. There can be no doubt whatever that, upon this appeal, the whole facts are open to us: but, inasmuch as there has been some argument at the Bar as to what the duty of the Court is in dealing with such an appeal, I wish to state that, in my opinion, it is not the duty of the Appellate Court to try the prisoner *de novo* upon the recorded depositions. I consider that, in dealing with the question of credibility of oral testimony (which in this, as in almost every other criminal case, is the really important question to be determined), we ought to place very great reliance on the opinion of the Judge who had the witnesses before him; who saw their demeanour; who heard the questions put to them: and who also heard their answers given in their own language. A mere record in another language and in a narrative form is but a very imperfect representation of what passes between a witness and Counsel, more especially in cross-examination. For these reasons, all Courts of appeal, whether civil or criminal, do rely very much on the opinion formed by the Court of original jurisdiction, and, in this case, I intend to adopt that principle. Of course, we must satisfy our own minds of the guilt of the prisoner; otherwise we must acquit him. But we are at liberty, and, in my opinion, we are bound, in forming our conclusion as to the credibility of the witnesses, to attach great weight to the opinion which the Judge who heard them has expressed upon that matter.

The offence of adultery is defined by the Code as having sexual intercourse with a person whom the adulterer knows, or has reason to believe, to be a married woman. There can be no doubt that Elokeshi was a married woman, and the two questions to be considered are whether the prisoner had sexual intercourse with her, and whether he knew, or had reason to believe, that she was married.

The evidence which goes to establish the sexual intercourse is that of Gopeenath Singh Roy, Ramessur Pattro, and Ooma Churn. Gopeenath Roy was, until this case arose, a servant of the Mohunt. He states that he has frequently seen Elokeshi at the Mohunt's private residence, which is at a short distance from the temple, at 9 and 10 o'clock at night, and also coming away from the house in the morning; that these visits were at intervals of three or four days, and lasted for about a year, being continued up to the month of Jeyt last, which is the month in which Elokeshi was killed by her husband. He says he saw the Mohunt alone with Elokeshi in his sleeping apartment, at the bathing ghât, and at the top of the house; that she was a modest-looking woman, 14 or 15 years of age, and wore a bordered sharee, bracelets on her arms, and anklets on her feet; that she had a red mark on her forehead, and her hair was tied. He had seen Elokeshi come accompanied by her younger sister Muktakeshi and a servant named Telibo; he had seen the three go up to the house; the former go in, and the two others go away.

Ramessur Pattro says that, in Bysack (April last), he went to the Mohunt, who is in the habit of lending money, to borrow

Rs. 16, to pay his rent; that he went to the Mohunt's private residence in company with Chand Mohun, the Mohunt's jemadar, and that, as he was standing at the top of the stairs outside the room in which the Mohunt was, he saw through the open door Elokeshi sitting on the bed, and talking with the Mohunt; that she was about a cubit distant from the Mohunt, and there was no one else in the room; the Mohunt gave her a slap on the back, whereupon she ran into another room out of his sight. The room in which they were sitting was not a bed-room, but a sort of large ante-room, out of which several rooms opened; amongst others, the Mohunt's bed-room.

Ooma Churn says that, on Sunday, the 7th or 8th Bysack (meaning, probably, Sunday, the 20th of April, which corresponds with the 9th of Bysack Bengalee, and 8th of Bysack Fuslee), he saw Elokeshi at Tarokeshur at the Mohunt's cow-house with Telibo at about 4 or 5 o'clock in the evening; that he spoke to her, and that she said she was going to the festival. She then went in at the private door at the west of the Mohunt's private house with Telibo.

The first consideration upon this evidence is its credibility. The first assessor does not believe that Elokeshi was at the Mohunt's house at all, evidently, therefore, disbelieving all three witnesses. The second assessor is satisfied that Elokeshi was at the Mohunt's house for an immoral purpose, and that with the Mohunt; and this assessor has, therefore, accepted some, if not all, of this evidence. The Sessions Judge has accepted the whole of this evidence as substantially true. He says as to the most important witness of all, Gopeenath Roy: "I have very carefully con-"sidered the evidence of this the most mate-"rial witness in the case, and have duly "weighed the arguments urged against his "credibility by the learned Counsel for the "defence, and the conclusion at which I "arrive is that the testimony of Gopeenath, as "given before this Court, is to be believed; "and I do believe it." The very serious objection to Gopeenath Roy's evidence is, that on one out of the several occasions on which he was examined he wholly withdrew his statements. That withdrawal he now explains by stating that he acted under the persuasion of the Mohunt and his dependants, and he tries to excuse himself by saying that he was drugged, and did not know what he was saying when he was examined on that occasion. There cannot be a doubt that the evidence of such a witness must be looked upon with very great suspicion, and that, to support a conviction, it ought to be corroborated.

Now, it appears to me that this evidence is so corroborated. I can see no substantial reason whatever for not accepting the evidence of Ramessur Pattro, and he describes a scene which appears to me to correspond entirely with the evidence of Gopeenath Roy. What Ramessur Pattro describes, I think, is just what would be likely to occur between a man in the Mohunt's position and a woman who was a habitual visitor to the house, and not what would be likely to have occurred had this been the woman's first and only visit. If, therefore, this evidence be accepted, it seems to me to corroborate generally the evidence of Gopeenath. And, besides that, there is nothing directly to impeach the credibility of this witness, the story itself is sufficiently precise in time and circumstance to render it exceedingly dangerous to the witness to have stated it, if it is not true. It is a story capable of being contradicted in several particulars, and especially it is capable of being contradicted by one at least of the Mohunt's own servants.

The evidence of Ooma Churn ought, as it appears to me, also to be accepted, and though it does not go near so far as that of the two other witnesses, it does, at any rate, establish that Elokeshi did visit the house of the Mohunt under circumstances calculated to excite very strong suspicion. A Mohunt has no zenana, and ought to have no intercourse with women whatsoever.

But it is said that, for the very reason that the prisoner is a Mohunt, his conduct is to be more favorably construed; that that which would be inadmissible in the case of any other person is admissible for him; and that women can and do approach him, even in his private apartments, for the purpose of making obeisance to him. In my opinion, there is nothing in the evidence which countenances such a statement. I should be loath to believe that there existed so much laxity in the Hindoo community without very clear testimony; and here the testimony is, in my opinion, the other way. The Sessions Judge has said that it may readily be conceded to the defence that women do go, as a matter of fact, to the Mohunt in his private rooms for the purpose of making obeisance, although the practice is not strictly proper or warranted by the requirements of Hindoo ideas. But this can only be a concession for the purpose of argument. As regards this particular shrine,

the evidence is that women do *not* visit the Mohunt in his private apartments. Ooma Churn, who speaks to the general practice, admits that elderly women, one or two, do go; but, taking his whole evidence together, I think it clear that he denies that it is proper for respectable women to do so. Both sides have appealed upon this subject to common knowledge and experience; I cannot venture to speak from experience; but from every enquiry which I have made, and from all that I have been able to learn upon the subject, I have no doubt whatever that for a young Bengalee woman to be seen alone in the private apartments of a Mohunt is as utterly destructive of her character as it would for her to be seen alone in the private apartments of any other man out of her own immediate family. I say this because social rules of this description ought not to be lightly disturbed or doubted; but at the same time it is scarcely necessary to add that this suggestion, even if well founded, does not explain away the evidence of Ramessur Pattro, and, of course, does not approach to an explanation of that of Gopeenath Roy, if that evidence be accepted.

It has been suggested that the prosecution is due to the enmity of one Bholanauth Roy, and that all the witnesses are connected with Bholanauth Roy. This person appears to be a zemindar of considerable property in and about Tarokeshur, and it would not be difficult, therefore, to trace some remote connection between him and the witnesses. But there is nothing to justify an inference that Bholanauth has taken any part in these proceedings, or used his influence in any way whatever; and the Sessions Judge has, I think rightly, refused to accept this suggestion.

Again, it is said that the woman may have had an intrigue with some one at the Mohunt's house, but not with the Mohunt, and it is pointed out that the prosecutor, in the first instance, charged one Kinaram with adultery as well as the Mohunt, and that Kinaram has absconded. But, as the Sessions Judge points out, the evidence, if believed, fixes the guilt on the Mohunt, and not on Kinaram. Not one of the witnesses speaks of having seen Elokeshi in the company of Kinaram, and there is, in my opinion, no pretence whatever for saying that the room where Ramessur Pattro saw her was in any sense the room of Kinaram. It was the room of the Mohunt, though not the room in which he usually slept; and whether Kinaram or any one else may, on some occasions, have slept there, seems to me to make no difference. The importance of this piece of evidence does not depend on the particular room where the Mohunt and Elokeshi were found, but upon their being found together and alone in a room in the Mohunt's private house.

Much has been said against the inferences drawn by the Sessions Judge from the fact that the prisoner has called no witnesses to disprove the case made against him. The strength of the inference which can be made from this omission as to the truth of the facts stated varies in every case. In the case of Ramessur Pattro, and the incident which he relates, I think it is a matter of observation that no attempt has been made to contradict him. As regards the conversation which Gopeenath Roy alleges that he had with the prisoner about waylaying the prosecutor, and preventing him from taking away Elokeshi, I do not think the prisoner could be reasonably expected to contradict it. As regards the means said to have been used by the prosecutor's servants to prevent Gopeenath Roy from giving evidence, I think the Sessions Judge was justified in making some observations on the circumstance that none of their servants have been called. I confess I do not understand the argument that because the statement made implicates them in a crime, therefore it is useless to call them to deny its truth. It is said that Mr. Stephen uses a somewhat similar argument in his Introduction to the Indian Evidence Act, page 46. But I must say that it seems to me a most extraordinary doctrine that, because an infamous charge is made against a man, it is useless to call him to deny it; and that whether he appears in the witness-box, and denies it on oath, and is submitted to cross-examination, or whether he remains silent, cannot afford any criteria as to his guilt or innocence. The whole practice of civil and criminal trials in which persons are constantly put forward at great expense, trouble, and inconvenience to deny such imputations, seems to me against such a notion.

Then it is said that familiarity, even culpable familiarity, does not constitute adultery, and that, even if full credence be given to the witnesses, they do not establish conclusively the fact of sexual intercourse. It is contended that actual sexual intercourse must be proved, and cannot be presumed, and that penetration ought to be proved. I have already said that this must be proved, but I know of no law in this country which requires

any particular kind of proof of adultery, or which recognizes any different degrees of proof in different cases. Differences in the proof required of the same fact in different cases very often arise out of the circumstances of the case. You can hardly presume sexual intercourse in a charge of rape, because, by the hypothesis, one of the parties is doing her best to prevent the act. The hypothesis in adultery is precisely the reverse, and the evidence differs accordingly. I know of no authority for saying that the evidence of sexual intercourse must be stronger on a charge of adultery than in a suit for a divorce The best proof available must always be produced, but in both cases evidence of opportunities sought for and obtained, and of familiarities which point strongly to an inference of guilt, are sufficient to establish the fact of sexual intercourse. I think it is impossible to interpret the facts deposed to in this case in any other way than as indicating that there was sexual intercourse between these persons very frequently repeated.

I fully concur, therefore, with the Sessions Judge in finding that the prisoner committed adultery with Elokeshi; but, in order to constitute the offence under the Indian Penal Code, it is necessary that the prisoner should have known, or should have had reason to believe, that she was a married woman. There is not the least doubt that, by the dress she wore, she distinctly asserted herself to be so. The insignia of marriage, as they have been called, are much more obvious and much more marked in the case of Hindoo women than with us. Still it is said that a prostitute may adopt these insignia in order to conceal her disgrace, and I am not prepared to say that this might not be done. If, therefore, this was the case of a man meeting and cohabiting with a stranger, I should not infer knowledge in the man from the mere fact of the woman's wearing the peculiar dress of a married person. But the case before us is a very different one. Elokeshi seems to have been a person well-known in the neighbourhood of Tarokeshur; her intercourse with the prisoner was long continued, and the witnesses say that she was a modest-looking person, and not likely, therefore, to be mistaken for a prostitute. I quite concur with the argument for the defence that this part of the case requires to be fully proved; and that it was not intended to punish fornication in one case more than another, but only to punish those who knowingly choose for their gratification the wife of another man; though I cannot accede to the argument of Mr. Jackson that it is necessary that the adulterer should know whose wife the woman is. In my opinion, it is sufficient if he knows that she is married; and I think it may fairly be presumed, from all the circumstances of the case, that the prisoner must have discovered, if not before, at least at an early period of his cohabitation, that Elokeshi was a married woman, unless there were some very peculiar circumstances which led to his being deceived, of which, however, he makes no suggestion. The prisoner has all along remained absolutely silent. In my opinion, therefore, this element in the crime of adultery has also been established against the prisoner. The punishment inflicted is severe, but I do not think it ought to be mitigated. It is a lesson which it is always desirable to enforce, that, if persons who profess special sanctity so far forget themselves as to commit infamous crimes, they may have to incur a specially severe punishment.

The appeal is dismissed.

Birch, J.—The prosecutor in this case, Nobin Banerjee, having been arrested for the murder of his wife Elokeshi, and being detained in jail as a prisoner under trial for a non-bailable offence, charged the accused, Madhub Chunder Giri, Mohunt of the Tarokeshur Shrine, and a follower of his, by name Kinaram, with adultery with his (the prosecutor's) wife Elokeshi. The Magistrate, apparently, in consideration of the peculiar position in which the prosecutor was placed, ordered the police to enquire into the charge of adultery. That enquiry resulted in a preliminary trial before the Joint-Magistrate, who committed the accused, Madhub Chunder Giri, to the Court of Session. The commitment was quashed by the Court of Session on the ground of want of jurisdiction on the part of the committing officer, and fresh proceedings were taken. The principal witness, Gopeenath Roy, upon being called up for examination on the 25th September, resiled from his former statement, and persisted in saying that he remembered nothing of what he had previously deposed to. The case was postponed on account of the Court being closed for the Doorga Pooja, and on the 10th October Gopeenath was again examined. Upon this occasion, his evidence was to the same effect as his first deposition, and he accounted for the intermediate defect of memory, by saying that he had been drugged with *sidhee* by the retainers of the Mohunt before he came under examination on that occasion. Before the Court of

Session he deposed to the same purport as before the committing officer. The conclusion at which the Judge arrives as to this man's testimony before him is that it is to be believed. Before us, in appeal, it has been strongly and persistently urged that the only evidence against the accused is that of Gopeenath; that he is an abandoned perjurer, and that no credence can be given to any statement of his. I propose to consider Gopeenath's evidence after that of the other witnesses, whose depositions are on the record.

I may here remark that Mohesh Bharatee, also a Mohunt, whose deposition was taken in the first enquiry, and whose evidence would have been important, has absconded, and cannot be found. Telibo, who would also have been a most important witness, has absconded. So has Kinaram, the follower of the Mohunt, and who also was charged by Nobin with the offence of adultery. Nilcomul, the father of the woman Elokeshi, has died; when we are not told, but it must have been since Elokeshi's murder on the night of the 27th May. Of those who knew most about this case, two have died, and the others have kept themselves out of reach.

Nobin Banerjee, the prosecutor, deposes to the marriage-ceremonies being performed between himself and Elokeshi. As to this, he is corroborated by other witnesses, and the fact that the marriage was in due form has been fully proved, and not contested. On returning to his father-in-law's house, on Sunday, the 25th May, Nobin found that he was excluded from a feast at the house of a relative, and that his brother Brahmins refused him the hookah. In consequence of this, and what he heard, he left his father-in-law's house that night, and his wife accompanied him to the house of another relative. There his wife Elokeshi made a statement to him, which is not admissible as evidence against the accused. On the Tuesday, Nobin overheard a conversation between his wife's father and Telibo, which led him to abuse his father-in-law, and charge him with inciting his daughter to commit adultery. Nobin mentioned what had passed to Hurinarain Banerjee, one of the witnesses, and that night Elokeshi was murdered by her husband. Nobin states that he and his wife lived on terms of intimacy and affection prior to this visit; he used to visit her as often as he could get leave from Calcutta.

Hurinarain Banerjee, a resident of the same village and a Brahmin, deposes to having seen sweetmeats and fish which came from Tarokeshur at the house of Nilcomul, but no inference can be drawn from this to inculpate the accused, as there is nothing to show that he sent them. This witness was in the habit of visiting the Mohunt's house on invitation, and he distinctly swears that devotees, male or female, do *not* go to the Mohunt's private house to make *pronam* or obeisance. His testimony on this point as that of a Brahmin in the habit of visiting the Mohunt becomes of importance, when we have to consider what is the usage of frequenters of the shrine.

Uma Churn, a Brahmin and family-priest, deposes that he saw Elokeshi about 5 in the afternoon on 7th or 8th Bysack with Telibo at Tarokeshur near the cow-house of the Mohunt; he saw her enter with Telibo into the Mohunt's bari through the side-door, and heard the men and women working around say, "There goes the mistress," Grihinee. Subjected to a lengthy cross-examination, he says distinctly: "Elderly women go to the Mohunt to perform the various duties of their religion. It is not exactly the practice for women to go to the Mohunt in his private residence, but Bengali women, one or two, do go. Respectable women, if they came to the Mohunt to make obeisance, and did not find him on the guddee, would not go to his house." All attempts to shake the testimony of this family-priest on this point fail. He saw Elokeshi, where for religious purposes she had no business to be, at dusk in the Mohunt's private house, attended by only a menial servant.

Ramessur Pattro (whom Nobin says he named as a witness, being told by his uncle and co-villagers who knew the facts) deposes to having seen the Mohunt sitting with Elokeshi on a bed in a room in the upper story of the Mohunt's house in Bysack last, and to the Mohunt's giving her a slap on the back as she ran to hide herself. This witness says he was accompanied by Chand Mohun, the Mohunt's jemadar. The testimony of this witness has been strenuously assailed. It has been suggested that he is under the influence of Bholanauth Roy, the zemindar. Of this there is not a scintilla of proof beyond the fact that the witness lives *within* Bholanauth Roy's zemindaree, within which the shrine of Tarokeshur is also situated. I give full credit to the testimony of this witness.

Gopeenath Singh was in the service of the accused until he gave evidence against him on the 12th August. He deposes to the existence of the intrigue between the

Mohunt and Elokeshi for more than a year, to her having been seen with the Mohunt on various occasions in the sleeping apartment, on the roof, bathing with him at his private ghât, and under circumstances which leave it impossible for any one having any knowledge of native habits and customs and of the position of the parties to arrive at any conclusion other than that she was there for improper purposes. She is described as a fair and handsome woman, of 15 or 16 years of age, wearing the dress and insignia of a married native woman; modest in her demeanour. Examined as to the usages of the shrine, the witness distinctly states that women do not go to the Mohunt's private house to make *pronam*, but only to the shrine, which is some distance from the private dwelling. In answer to the Judge, the witness said that the Mohunt treated Elokeshi as his wife, not as his mother. In the expressive native phrase, Mohunts are supposed to regard all women as their mothers. The witness deposes to the Mohunt's having tried to induce him by promises and threats to save him, *i.e.*, not to give evidence against him, to his having been taken by the Mohunt's retainers to the Mohunt, and to his having been subsequently drugged with a view to stupefying him just before he had to go to Court to give evidence in the second inquiry. I see nothing improbable in this part of the evidence; it remains uncontradicted, and upon some points, if the story was false and concocted, the Mohunt could have adduced evidence. Everyone who has had experience in criminal trials in the mofussil in which natives of wealth and influence are implicated knows that it is not an uncommon thing for witnesses to be threatened or deported to prevent their giving evidence.

I must say that, after careful consideration of Gopeenath's evidence, and of the arguments of Counsel against its being relied on, I concur with the Sessions Judge in believing it. It does not stand alone; it is corroborated by other witnesses, and the whole, taken together, leaves upon my mind no doubt whatever that Elokeshi visited the Mohunt for improper purposes, and that he committed adultery with her.

Upon the part of the accused we have a simple plea of not guilty, a refusal throughout to explain anything, or to tender exculpatory evidence. A warrant was issued for his apprehension on the 16th June, and he absconded, and did not appear until the 1st August.

It has been contended that it would be impossible to convict a man of adultery without direct evidence of an act of adultery; and that, in a criminal case of this nature, we must require much stronger evidence than would be required in a civil action for divorce. I find no authority for either of these propositions. Lord Stowell remarks in the case of Loveden *vs.* Loveden, 2 Haggard's Consistory Reports: "It is a fundamental rule that it is not necessary to prove the direct fact of adultery; if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely, indeed, that the parties are surprised in the direct act of adultery. In every case, almost, the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion, and unless this was the case, and unless this was so held, no protection whatever could be given to marital rights.

"What are the circumstances which lead to such a conclusion cannot be laid down universally; they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearing in decisions upon the particular case." He goes on to say: "Upon such subjects, the rational and the legal interpretation must be the same."

Although this judgment was pronounced in the Ecclesiastical Court, the principles it lays down are useful as a guide, and have been followed in cases in the Divorce Court.

We have been referred to the case of Hunt *vs.* Hunt, 1 Deane's Ecclesiastical Reports, as an authority. I must say that it seems to me that no precedent is likely to be of much assistance to us. For weighing evidence and drawing inferences from it, there can be no canon. Each case presents its own peculiarities, and common sense and shrewdness must be brought to bear upon the facts elicited in every case, which a Judge of fact in this country, discharging the functions of a Jury in England, has to weigh and decide upon. Every man, be he Judge or Juror, must, in considering the case before him, put to himself the same question—Am I, as a reasonable man, convinced that the evidence I have heard satisfies me beyond all doubt that what is said to have taken place has occurred? It seems to me that the only distinction, if any, which can be drawn between civil and criminal cases as to the

amount of proof requisite is this. In ordinary civil cases, a Judge of fact must find for the party in whose favor there is a preponderance of proof, although the evidence be not entirely free from doubt. In criminal cases, no weight of preponderant evidence is sufficient short of that which excludes all reasonable doubt. The party accused is entitled to the benefit of the legal presumption in favor of innocence, and in doubtful cases that may suffice to turn the scale in his favor. The burden of proof is undoubtedly upon the prosecutor; if upon such proof as he adduces there is reasonable doubt remaining, the accused is entitled to the benefit of it; but if the evidence establishes the truth of the charge, and satisfies the reason and judgment of those who are bound to act conscientiously upon it, such evidence must be taken to be proof beyond reasonable doubt justifying a conviction. To go further than this, and require absolute certainty, would go to the length of excluding altogether circumstantial evidence. A passage has been cited from Mr. Mayne's Commentaries on the Penal Code, in which the learned commentator remarks that stronger evidence will be required under the Penal Code than in the English Divorce Court; "for the wife can be called as a witness against the adulterer." In the case before us, the wife could not be called. She had fallen a victim to her husband's anger; it surely cannot be argued that, because we have not her evidence, we cannot convict the adulterer.

We must not lose sight of the fact that, in such a case as this, we must strive to place ourselves in the position of a native Jury. No analogies drawn from the experience of Western civilization and the feelings of Europeans upon such matters can assist us. They are more likely to mislead. The usages of Eastern and Western society are not parallel. What may be regarded as innocent in one state of society may in another be suggestive of guilt. There can be no possible comparison between the relations of a European doctor and a female patient, of a priest at the confessional and a confessing female penitent, and the relations of the Mohunt and Elokeshi, as has been suggested in this case. We must endeavour to consider this painful case from the Hindoo point of view. The guilt of the accused must depend upon the circumstances as they appear to him.

It has been asserted in argument that Elokeshi, though a young married Brahmin woman, in visiting the Mohunt at his private house, was performing her religious duties according to the usages of the Tarokeshur Shrine, and performing praiseworthy acts of devotion to the Mohunt. I confess that I was surprised to hear such an argument raised at the Bar of this Court. It may be that the tendency of modern times is to modify the ancient rules regarding the duties of Hindoo women and their attention to the performance of ceremonies under certain restrictions, but I require distinct evidence to satisfy me that the custom asserted is in vogue at the Tarokeshur Shrine. I do not believe that any Mohunt would dare openly propound the doctrine that it is a holy and meritorious act for a young married Brahmin woman to visit him alone in his private apartments. In this case, what little evidence we have is all the other way; the witnesses say that no respectable women will perform *pronam* but at the shrine, and that they would not visit the Mohunt in his private rooms; and the Mohunt has not attempted to prove that the practice of devotees at the shrine was such as his Counsel would wish us to believe.

Baboo Juggadanund Mookerjee, in his reply, challenged contradiction of his statement that no young married woman is allowed to visit any shrine, unless she is accompanied by a male relative, or a family-priest, or his relations; and that, if she does go, she creates scandal, and is liable to be put out of caste; and he appealed to our knowledge of Hindoo feelings on the subject.

Upon such matters, we can only refer to the books which prescribe the duties of Hindoo women, and presume that the directions therein contained are still in force, as nothing has been shown to the contrary.

"A husband is forbidden to send his wife to any festival, or to any holy place, unless she is accompanied by her relatives." Prantoshini, p. 551.

"A married woman can observe no religious rite apart from her husband." Manu, Chapter 5, Section 155.

"The wife must never act independently of her husband, otherwise people will speak ill of her. Apart from her husband, she can make neither offerings nor vows." Vishnu Sanghita Smriti, p. 3.

"No wife shall, with a view to secure any object of her own, and without her husband's permission, make any religious offerings, or undertake any religious rites." Subda Kulpa Drama, Vol. III., under heading Potibrata.

"All religious observances such as pujas to idols, offerings, rites connected with vows,

pilgrimages to Benares, Gya, and Preag, &c., be regarded as having been performed by the woman who reverences her husband. There is no occasion for her individually to attend to these things." Brahma Boiburta Puran, Krishna Janma Khanda, Chapter 24.

These and other texts show that Hindoo married women are not required, as has been asserted, to visit such shrines as Tarokeshur; if they do visit them, modern observances require that they should visit them attended by male relatives, or their gurus.

I should not have thought it necessary to touch upon this point, had we not been so frequently told that Elokeshi's visits to the Mohunt were acts of devotion praiseworthy in the eyes of Hindoos.

That the accused knew that Elokeshi was the wife of another man, there can be no doubt. The intrigue had lasted for more than a year; the woman lived not far from the temple; her father used to visit the Mohunt: she wore the insignia of matrimony, and in an agricultural village no one dare simulate those insignia. That there was no consent or connivance on the part of the husband, is equally clear. Like most young native men who have to attend office in Calcutta, or earn their livelihood there, Nobin Banerjee left his young wife in her father's house in the charge of her natural guardian, to whom, in his enforced absence, he would naturally entrust a young wife whom he could not afford to allow to reside with him. Nobin deposed in this case after he had been convicted and sentenced for the murder of his wife, and his statement bears the impress of truth. As soon as he learnt of his disgrace from the neighbours and from his wife, he removed her from her father's house, and overhearing the day after a remark of her father suggesting further villainous designs on the part of the Mohunt upon Elokeshi, Nobin murdered his wife that night.

I have given the case my most careful consideration, and I am satisfied beyond all reasonable doubt that the accused has committed the offence of which he has been convicted by the District Judge.

In considering what the sentence should be, I put out of my consideration the murder of Elokeshi by her husband in consequence of her adulterous connexion with the accused.

To my mind, the offence of which I find the accused guilty is considerably aggravated by his position as head of a venerated shrine, by virtue of which he is regarded by his co-religionists almost as an impersonation of the deity whose shrine is in his charge. A man in his position has immense power and influence in this country. If he is faithless to his trust, and if, under the cloak of religion, and regardless of the decided prohibition of such conduct in the writings which he holds sacred, he employs his opportunities to debauch married women, he merits condign punishment. The sentence imposed by the District Judge is not too severe under the circumstances, and I would affirm the conviction and sentence.

The 16th December 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

High Court—Acquittal—Act X. of 1872, Section 296.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Magistrate of Bograh.

The Queen

versus

Hatoo Khan.

HELD, on a reference under Section 296, Act X. of 1872, that the High Court has no power to set aside an order of acquittal, even where a Deputy Magistrate acts illegally, and acquits the prisoner improperly.

Reference.—UNDER the provisions of Section 296 of the Code of Criminal Procedure, I have the honor to forward the records of a case (charge laid under Sections 141, 441, and 352, Code of Criminal Procedure) tried by Second-class Deputy Magistrate Baboo Dwarka Nath Roy. The Deputy Magistrate, after hearing two of the prosecutor's witnesses only, passed an order of acquittal, under Section 211 of the Code of Criminal Procedure, in this case, illegally, in my opinion, inasmuch as this order was passed without taking the evidence of the remaining witnesses named by the prosecutor, two of whom at least were present at the trial, and the Deputy Magistrate was accordingly bound to examine them under Section 207, Code of Criminal Procedure. Moreover, the Deputy Magistrate has omitted to examine the complainant on the day of trial in the presence of the accused, as he was clearly bound to do. The Deputy Magistrate's explanation, which is not satisfactory, accompanies this report. I would request that the High Court would be pleased to pass

an order directing the re-trial of the accused with the observance of the proper procedure.

Judgment of the High Court.

Markby, J.—We do not think that we have power to do what the Officiating Magistrate asks, namely, to set aside the acquittal of the prisoner and to direct a re-trial. The proceedings of the Deputy Magistrate were undoubtedly illegal, but they have resulted in the acquittal of the prisoner, and we are not empowered by the Criminal Procedure Code to interfere when a prisoner has been improperly acquitted. If a prisoner has been improperly discharged, we may order him to be tried, or to be committed for trial, under the second clause of Section 297. If the Legislature had also intended us to interfere when the prisoner was acquitted, it would undoubtedly have been so expressed in that clause.

The 18th December 1873.

Present:

The Hon'ble F. A. Glover and W. Markby, *Judges.*

Rescue—Lawful custody—Act XLV. of 1860, Section 225.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of rescuing from lawful custody a person charged with an offence punishable with death.

The Queen

versus

Degumber Aheer and another, *Appellants.*

Before a conviction can be had under Section 225, Penal Code, it must be proved that the person whom the accused are charged with having rescued was in lawful custody at the time.

Glover, J.—THE prisoners have been convicted, under Section 225, Penal Code, of rescuing from lawful custody one Nehal Panday. The trial was supplementary to one held in January last, when four other persons were convicted of the same offence, and duly sentenced.

Of course, before the prisoners can be convicted under Section 225, it must be shown that the person said to have been rescued was in lawful custody at the time, and this involves the question whether the person, whom the witnesses 1 and 2 (police-constables) say they arrested, was the Nehal Panday, for whose arrest they had a warrant.

Now, neither of these witnesses knew Nehal Panday by sight; they depose that they arrested him, because one Goorbhurun Aheer, a chowkeedar, pointed him out to them as the man against whom they had a warrant.

This Goorbhurun has not been examined. His deposition was recorded in the former trial, but he was considered to have perjured himself in that case, although he made the same statement both to the committing officer and to the Sessions Judge, and was committed to take his trial for giving false evidence. There is nothing on this record to show what the result of the trial was; but, supposing it to have ended in a conviction, that would not assist the prosecution in this case.

It had to be proved that the person whom the policemen arrested was Nehal: and this has not been done. The witnesses did not know Nehal, and there is no proof of their allegation that he was pointed out to them by Goorbhurun chowkeedar—not to mention that the arrest was made at a time (after nightfall) when all recognition would be difficult.

It seems to me that the prosecution has altogether failed, and that the prisoners are entitled to an acquittal.

Markby, J.—I concur in acquitting the prisoners.

The 22nd December 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

High Court—Haut—Judicial proceeding—Act X. of 1872, Sections 294—297, and 518.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Backergunge.

Arzanoollah

versus

Nazir Mullick and others.

Baboo Doorga Mohun Dass for Arzanoollah

The powers of dealing with cases coming before the High Court under Sections 294, 295, 296, are only such as are declared in Section 297, under which Section the Court can only deal with errors in judicial proceedings. An order by a Magistrate, under Section 518, Code of Criminal Procedure, upon information and without any formal enquiry or taking of evidence, prohibiting a person from re-opening a haut, is not a judicial proceeding.

Markby, J.—IN this case, we are asked to set aside an order made under Section 518 of

e Code of Criminal Procedure on the ground illegality. The case is referred to us for at purpose by the Sessions Judge under ection 296 of the Code of Criminal Procedure.

The order made is that a certain haut, hich had been disused for some time, should ot be re-opened.

It appears that there had formerly been wo rival hauts—the Chalisa haut and the hanga Pasha haut; and that, in consequence of a riot, the owners of these two auts were directed not to hold them upon ne same day, the result of which was that he owner of the Chalisa haut gave it up.

Subsequently, an intention of re-opening he Chalisa haut was entertained, whereupon the Deputy Magistrate, under Section 18 of the Code of Criminal Procedure, upon nformation, and without any formal enquiry, r taking any evidence, issued an order prohibiting absolutely the re-opening of the haut.

This order is considered by the District Judge to be illegal, because the Magistrate, though he might prohibit the holding of the haut at a particular place and time, could not prohibit absolutely the holding of any haut at all.

The view taken by the Sessions Judge certainly appears to be supported by the decisions reported in 13 Weekly Reporter, Criminal Rulings, 73, and 10 Weekly Reporter, Criminal Rulings, 36; and the Full Bench, in a recent case* on this subject, very carefully abstained from holding that a Magistrate could issue an order under this Section which would be utterly destructive of a man's right of property.

But even supposing the order to be one which the Deputy Magistrate had no power to make, still it appears to me that we cannot set it aside. It is true that, under the old Procedure Code, orders under Section 62 (which corresponds to Section 518 of the new Code) were constantly set aside by this Court when brought before it under Section 434. But Section 434 of the old Code is unrestricted, and enables the Court of Session to refer for the orders of this Court any order of the Magistrate whatsoever, and the power of this Court to deal with such orders is not in any way defined, and therefore it might be presumed that, whenever such orders were found to be illegal, they might be set aside. Under the new Code, the Court of Session has, under Sections 295, 296, the same power of referring any orders of the Magistrate to this Court; but I think the wording and the arrangement of the Sections of the new Code indicate that the Legislature intended that our powers of dealing with cases coming before us under Sections 294, 295, 296, should be only such as are declared in 297. Now, under Section 297, we can only deal with errors in judicial proceedings; and, this not being a judicial proceeding, we have no power at at all under the Code of Criminal Procedure to interfere.

Mr. Justice Birch, sitting with the Chief Justice, had already expressed this opinion in a case reported in 20 Weekly Reporter, Criminal, 53, and, upon consideration, I have come, though I must admit with some hesitation, to the same conclusion.

It was argued that, inasmuch as this was not an order authorized by Section 518, it was not within Section 520, and was, therefore, a judicial proceeding. But that, I think, would be an evasion of the law, which was, I believe, intended to prevent any revision by this Court of the action of the Magistrates under this Section.

The Sessions Judge has also asked us to deal with this case under Section 15 of the Charter Act. But if it is desired that we should exercise any powers which we may possess under that Section, I think there must be a separate application for that purpose.

Birch, J.—I am of the same opinion.

The 22nd December 1873.

Present:

The Hon'ble W. Markby and E. G. Birch, *Judges.*

Notification—Gaming—Act II. (B. C.) of 1867, Section 2.

(Miscellaneous Case.)

Banee Madhub Koondoo, *Petitioner.*

Baboo Gooroo Dass Banerjee for the Petitioner.

The notification which the Government is empowered to issue under Section 2 of the Gaming Act, II. (B. C.) of 1867, should specify the limits of any town to which it is intended the Act should apply, and must be published in three consecutive Gazettes.

Where a first notification, which extended the Act to a town with specification of limits to which it was intended to be applied, was published only once, and a subsequent notification, published three times, extended the Act to the town without specifying the limits to which the Act was to apply, it was held that the subsequent notifications were not sufficient, but that that did not prevent the operation of the Act in places which are shown to be undoubtedly within the town according to its ordinary designation.

* 18 W. R., Crim., 47.

Markby, J.—In this case, which is before us under Section 294 of the Code of Criminal Procedure, the question for consideration is whether the defendant has been rightly convicted for an offence under the Gaming Act (Act II. of 1867 of the Bengal Council).

The only point of law for our consideration is whether the notifications required by Section 2 of the Act have been published in the Gazette.

The course taken by the Government appears to have been this. In the first instance, a single notification was published, signifying that the Act was applied to various towns, amongst others to Berhampore; and in that notification the Government, as it is empowered to do by Section 2, specified the limits of the town of Berhampore for the purpose of the Act. But there was no notification published in the two following Gazettes, and, therefore, the provisions of the law not having been complied with, there could be no conviction under the Act in the places mentioned in the notification.

Subsequently, the Government caused a notification to be published in three successive Gazettes, stating that, doubts having arisen on the subject, it was declared, with reference to former notifications on this subject, that the Act was applied to Berhampore and the other towns mentioned in the former notice.

In these three notifications, the limits of the towns to which the Act was applied were not specified as in the former notification.

The objection taken in the present case is that the notifications are incomplete, inasmuch as the limits of the town of Berhampore are not specified, and therefore it cannot be known to what district the Act applies. It is urged that this Act creates a new offence, and that only in particular places, and that, unless limits are specified, it will be left to the evidence of witnesses to determine the applicability of the Act, which inconvenience the Legislature intended to obviate by requiring the Government of Bengal to state precisely the limits within which the Act was applied.

The view taken by the Sessions Judge is that the notifications are sufficient. He thinks that persons interested were bound to inquire whether the previous notification gave the limits, and that, as it did so, the Act was complied with.

With this view we are, upon consideration, unable to agree. We think that nothing can be imported by reference from the earlier notification into the three subsequent notifications: and that, if the Government desires to specify the limits of any town for the purposes of the Act, these limits must be specified in a notification, which notification must be published in three successive Gazettes.

But, upon the whole, we have come to the conclusion that, though it would be useful and desirable that the limits should be specified, and though probably it was by an oversight that this was not done, it is not absolutely necessary to read Section 2 as if it said "by a notification, which shall contain a specification of the limits," &c.

Of course, the result of not specifying the limits will be to reduce the operation of the Act to what is clearly and indisputably within the towns specified. Should any doubt exist, it must be held that the Act is not applicable. But we are not prepared to say that the Act has not been applied to places which are shown to be undoubtedly within those towns according to their ordinary designation.

This being so, we do not feel called upon in the present case to interfere. There does not appear to be any positive evidence that Kagra, where this occurrence took place, is within the town of Berhampore: but no question of this kind was raised by the defendants at the trial when the facts were being inquired into, and the Sessions Judge has stated that Kagra is included within the municipal township, and, in fact, constitutes the principal and most populous part of Berhampore.

The 7th January 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Obstruction—Procedure—Act X. of 1872, Sections 518 and 521.

(Miscellaneous Case.)

Brindabun Dutt, *Petitioner.*

Mr. M. L. Sandel for the Petitioner.

A Magistrate of the 2nd class, having passed an order under Act X. of 1872, Section 518, for the removal of an obstruction, the Magistrate, on appeal, held that, though

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proceedings of the Subordinate Magistrate were without jurisdiction, he (the Magistrate) was competent, under Section 518, to direct the removal of the obstruction; and he passed an order accordingly.

HELD that the order of the Magistrate under Section 518 was illegal, and that he should have proceeded under Section 521 and the following Sections of the Code.

Kemp. J.—THE applicant obtained an order from Justices Phear and Morris calling for the record of this case, and notice also appears to have been sent to the district-authorities. The record is now before us. It appears that one Tara Churn Bosoo complained that the defendant Brindabun Dutt had closed up a passage; he also charged him with wrongful obstruction. The case was tried by the Joint Magistrate, Mr. Johnson. That officer convicted the petitioner before us under Section 283, and fined him. He also, apparently under Section 518, directed the obstruction to be removed. On appeal, the Magistrate was of opinion that Mr. Johnson had exceeded his authority, inasmuch as he was a Second-class Magistrate without powers to act under Section 518; but, says the Magistrate, inasmuch as Brindabun Dutt has had ample time to give evidence, and explain away any charge brought against him for obstructing this road, he, as Magistrate sitting in appeal, was competent, under Section 518, to direct the obstruction to be removed. He, therefore, passed an order directing the removal of the obstruction. It is now contended before us that the order of the Magistrate under Section 518 was illegal. We think, with reference to this order, that such is the case. We do not find that the Magistrate passed his order for the immediate removal of the alleged obstruction, on the ground that such order is likely to prevent, or tends to prevent, obstruction, annoyance, or injury to any person lawfully employed, or danger to human life, health, or safety, or to prevent a riot or an affray. This is clearly a case in which the Magistrate ought to have proceeded under the provisions of Section 521 and the following Sections. If the Magistrate had proceeded under that Section, then the applicant before us would have had an opportunity of showing cause, and also would have enjoyed the privilege of applying to the Magistrate for an order to appoint a Jury to try the case. The proceedings of the Magistrate appear to us to be illegal. We, therefore, quash his order, and direct him to proceed, if any application be made to him to do so, under the provisions of Section 521 and the following Sections which are applicable to cases of this description.

The 10th January 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Local inquiry—Act X. of 1872, Section 533.

(Miscellaneous Case.)

Mir Dhunoo, *Petitioner,*

versus

Thomas Brown, *Opposite Party.*

Baboos Kally Mohun Dass and *Kally Kishen Sein* for the Petitioner.

Baboos Juggadanund Mookerjee and *Romesh Chunder Mitter* for the Opposite Party.

When a local inquiry under Section 533 of the Code of Criminal Procedure is instituted, it becomes part of the proceedings in the case, and the party affected by it is entitled to be acquainted with the results of it, and to have an opportunity of rebutting the deputed Magistrate's report, if he thinks necessary so to do.

Phear, J.—WE think that there has been material error in the proceedings of the Magistrate.

It appears that, on the 25th September, he found it necessary to institute a local inquiry, and he made an order accordingly. In doing this, he must have been acting under the provisions of Section 533 of the Criminal Procedure Code, which says: "Whenever a local

"inquiry is necessary for the purposes of "this Chapter, any Magistrate of the first "class may depute any Magistrate subordi- "nate to him to make the inquiry, and may "furnish him with such instructions, consist- "ent with the law for the time being in "force, as may seem necessary for his guidance, "and may declare by whom the whole or "any part of the necessary expenses of the "inquiry shall be paid."

We think that, when an inquiry of this kind is instituted, it becomes part of the proceedings in the case, and the party affected by it is entitled to be acquainted with the results of it, and to have an opportunity of rebutting the deputed Magistrate's report, if he thinks necessary so to do.

In this particular case, it appears to be doubtful whether the Magistrate paid any attention at all to the return of the Deputy Magistrate, Mr. Williamson, whom he deputed to make the inquiry, or whether he limited himself to taking Mr. Williamson's own evidence on the 13th October. If he did limit himself to this evidence, then we think that he was in error; and we may point out that the evidence of a gentleman, whose knowledge of the facts was obtained in the way in which Mr. Williamson's knowledge was obtained, is hardly to be termed the evidence of an ordinary witness. He is a person sent down after the contest between the parties had reached a very advanced stage in Court, for the purpose of becoming or being made, so to speak, a witness of facts under litigation. Apart from Section 533, it probably would be more than doubtful whether the Magistrate would have power to create a witness other than an expert witness in this manner.

On the whole, we think that the petitioner was, at any rate, entitled to know the report of Mr. Williamson before Mr. Williamson's evidence was taken on the 13th October, and consequently there has been a material error in these proceedings. Accordingly, we set aside the Magistrate's order, and return the record to the Magistrate, in order that the hearing may be carried on from the stage at which it was before him on the 13th October. The petitioner must be afforded reasonable opportunity of learning the contents of Mr. Williamson's report, of cross-examining Mr. Williamson thereupon if he desires it, and also the opportunity, if he thinks fit, of rebutting any of the material statements made in that report.

The 10th January 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Haut—Police-officer—Jurisdiction—Act X. of 1872, Section 518.

(Miscellaneous Case.)

Banee Madhub Ghose, *Petitioner.*

versus

Wooma Nath Roy Chowdhry, *Opposite Party.*

Baboo Ashootosh Mookerjee for the Petitioner.

Mr. R. T. Allan and *Baboo Anund Chunder Ghosal* for the Opposite Party.

The operation of Section 518, Code of Criminal Procedure, is confined to cases where, in the opinion of the Magistrate, the delay which would be caused by adopting a different procedure from that specified in the explanation to that Section would "occasion a greater evil than that suffered by the person upon whom the order is made, or would defeat the intention of this (the 30th) Chapter."

Where a Magistrate, without hearing the petitioner, or giving him an opportunity of being heard, and simply upon the foundation of a police-officer's report, directed the petitioner to abstain from holding a haut upon his land on a certain day, because another party had long been accustomed to hold a haut upon his land adjacent to the petitioner's haut on the day following that in which the petitioner held his haut, it was held that his order passed under Section 518 was *ultra vires*, the police-officer's report being vague and insufficient, and a private interest of this kind not affording a ground for making an order under Section 518, or any other order under the Criminal Procedure Code.

Phear, J.—We think that this rule must be made absolute upon the ground that the Magistrate has acted *ultra vires*.

The facts appear to be that the Magistrate has directed the petitioner to abstain from holding a haut upon his land, which he has been hitherto accustomed to hold on Sundays, upon that day or any other day in the week except Thursday, because one Wooma Nath Roy Chowdhry, called the opposite party, has long been accustomed to hold a haut upon his land adjacent to the place of haut

of the petitioner on the day following that of the petitioner's haut, namely, the Monday. And the Magistrate has made this order without hearing the petitioner, or giving him an opportunity of being heard, simply upon the foundation of a police-inspector's report. If, then, the Magistrate has any jurisdiction to make this *ex-parte* order at all, it must be by virtue of Section 518 of the Criminal Procedure Code. This Section runs thus: "A "Magistrate of the District, or a Magistrate "of a division of a district, or any Magis- "trate specially empowered, may, by a "written order, direct any person to abstain "from a certain act, or to take certain order "with certain property in his possession or "under his management, whenever such "Magistrate considers that such direction is "likely to prevent, or tends to prevent, "obstruction, annoyance, or injury, or risk of "obstruction, annoyance, or injury, to any "persons lawfully employed, or danger to "human life, health, or safety, or a riot or an "affray."

And appended to this Section is an explanation in these words:—

"This Section is intended to provide for "cases where a speedy remedy is desirable, "and where the delay which would be "occasioned by a resort to the procedure "contained in Section 521 and the "next following Sections would, in the "opinion of the Magistrate, occasion a "greater evil than that suffered by the person "upon whom the order was made, or would "defeat the intention of this Chapter."

The effect of this explanation clearly is to confine the operation of Section 518 to cases where, in the opinion of the Magistrate, the delay which would be caused by adopting a different procedure, namely, that specified in the explanation, would "occasion a greater "evil than that suffered by the person upon "whom the order is made, or would defeat the "intention of this Chapter." If the Magistrate exercises the power given by this Section under circumstances not intended by the Legislature, then, clearly, as it seems to us, he is acting *ultra vires*, and ought to be set right by this Court in exercise of the extraordinary powers conferred upon it for this purpose by the Charter Act. It would be useless for the Legislature to express in words that it is its intention that these powers should be exercised only in certain limited cases, if, nevertheless, the Magistrate could, uncontrolled, exercise those powers without any restriction whatever, and without any responsibility to a superior Court.

Now, in the present case, the Magistrate has certainly not expressed his opinion that the delay which would be occasioned by adopting the more lengthy procedure indicated in the explanation would occasion a greater evil than that suffered by the petitioner as a consequence of his order; and not only has he not expressed this opinion, but it seems to us, upon the materials which are before us, that there exists no foundation whatever upon which such an opinion could be, in reason, formed or based. The report of the inspector falls very far short of saying that a breach of the peace is imminent in consequence of the one haut being held on one day, and the other haut being held on the next day. It is almost impossible to suppose, upon the facts of this case, meagre as they are, that there could be such a pressing emergency with regard to the making of this order that the Magistrate could not, in the interest of the public, delay acting on Wooma Nath's complaint, or the police-report, the short time which would be needed for summoning the petitioner before him. Possibly, Wooma Nath Roy Chowdhry may be very anxious, indeed, to suppress altogether the holding of a market by his neighbour, or to put the day of holding it as far distant as he can from the day on which his own is held. But a private interest of this kind does not afford a ground for making an order under Section 518, or for making any other order under the Criminal Procedure Code. The grounds upon which this order can rightly be made, if at all, are specified in Section 518. In this case, no other ground for the order amongst those specified in that Section is even suggested, except the last one, namely, a riot or an affray, or a breach of the peace, being likely to occur. And the police-inspector's report does not go beyond saying that it would not be astonishing if that, at some future time, a breach of the peace might happen in consequence of the rivalry between the two hauts, and the proximity, in regard to time, in which these hauts were held. In short, we think that the conditions which are made necessary by Explanation 1, in order that the Magistrate may have jurisdiction to exercise the summary powers given by Section 518 in the absence of the person upon whom the order may be made, are not satisfied in this case, and that, consequently, the Magistrate making the order complained of acted without jurisdiction.

The rule is made absolute.

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The 13th January 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Breach of the peace—Police-report—Act X. of 1872, Sections 491, 530.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Backergunge.

The Queen

versus

Ram Chunder Roy.

A police-report is, under Act X. of 1872, Section 530, explanation, sufficient information on which a Magistrate may take action in a case of apprehended breach of the peace under Section 491 of that Act.

Reference.—In the village of Gunganuggur, in Thannah Palung, there exists an old market owned by Chunder Shekhur Chakladar and others, held twice a week, *viz.*, on Monday and Friday. Owing to certain altercations with the owners of this hât, some of the traders, in conjunction with a portion of the inhabitants of the village, recently established a new and rival hât with a daily bazar on a piece of land of which the petitioner Ram Chunder Roy is a co-sharer with others, situated at about 300 yards to the north of the old market.

The Deputy Magistrate of Madareepore, being of opinion that the simultaneous existence of the two hâts is calculated to lead to a breach of the peace, has bound over the proprietors of the lands on which the hâts are held in various sums to keep the peace under Section 491 of the Criminal Procedure Code, and, under Section 518 thereof, issued a notice to the owners of the new hât to alter its days, and abolish the daily bazar.

For the reasons given in my order on the back of the petition submitted with the record, I consider the Deputy Magistrate's order in connection with the petitioner Ram Chunder Roy to be illegal, and recommend that it may be set aside.

Reasons given by the Sessions Judge.

The Deputy Magistrate's order requiring Ram Chunder Roy to enter into recognizances to keep the peace seems to me to be illegal for the following reasons:—

1. There was no information before him that Ram Chunder Roy was about to commit a breach of the peace, or that he was about to do any act likely to cause a breach of the peace.

2. When appearance was made to show cause against the order, the evidence not only did not show that Ram Chunder Roy was likely to occasion a breach of the peace, but it showed that there was no reason to suppose he was likely to do so.

The case arose out of the establishment of a rival hât in proximity to a previously existing one. Ram Chunder Roy was a part-owner of the land on which the new hât is held, but does not reside near it. And it is shown that he has leased his interest in the land to two other persons. There is, therefore, no reason for binding him over to keep the peace.

Considering the Deputy Magistrate's order to be illegal, I direct that the record be submitted to the High Court under Section 296, Code of Criminal Procedure.

Judgment of the High Court.

Glover, J.—We do not think it necessary to interfere in this matter.

By Section 296, this Court could set aside the Deputy Magistrate's order, if it were shown to be contrary to law. The Sessions Judge considers that it was contrary to law, first, because the Deputy Magistrate had no information before him that Ram Chunder Roy was likely to commit a breach of the peace; and, secondly, because there was no evidence on the record to support such a charge.

On the first point, the Deputy Magistrate does not seem to have been wrong; for a police-report has, by the explanation to Section 530, Code of Criminal Procedure, been declared to be sufficient information on which a Magistrate could take action. The subsequent evidence must be given in a regular way, and by witnesses examined in the Magistrate's presence, but a Magistrate could act under Section 491 on the report of the police.

But, were it otherwise, Ram Chunder Roy was not prejudiced by what the Deputy Magistrate did. He was called upon to show cause, and appeared accordingly, and evidence was taken to prove the cause of the two contending parties. The Sessions Judge says that there was *no* evidence to show that Ram Chunder Roy was likely to commit, or

cause to be committed, a breach of the peace; but the record shows the contrary. There was sworn testimony to the fact in the evidence of the witnesses, who deposed that the owner of the new hât was preparing active means of resistance which were very likely to result in an affray. We give no opinion as to the worth of this evidence: but the evidence, such as it is, was on the record, and the Sessions Judge probably overlooked it.

The Deputy Magistrate's order would have been illegal only if there had been *no* evidence. As it is, it may be an improper order, but cannot be said to be an illegal one with which this Court could interfere under Section 296, Code of Criminal Procedure.

The papers are returned to the Sessions Judge.

The 14th January 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Witnesses—Cross-examination—Accused person—Act X. of 1872, Section 218.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Mymensingh.

The Queen

versus

Amiruddin Fakeer.

Under Section 218 of the Code of Criminal Procedure, a Magistrate is not competent to refuse to recall the witnesses for the prosecution to be cross-examined by the accused, and it is not necessary for the accused to show that he has reasonable grounds for his application.

Reference.—In a case before Baboo Chundro Mohun Roy, Deputy Magistrate at Mymensingh, one Amiruddin was charged with an offence under Section 498 of the Indian Penal Code.

After the charge against the accused had been drawn up, he petitioned the Court that the witnesses for the prosecution might be recalled, in order that he might cross-examine them again on certain matters.

The Court disallowed the prayer of the accused, and sentenced him to rigorous imprisonment for six months.

The Officiating Magistrate of the District confirmed the order of the Lower Court on appeal, notwithstanding the objections urged by the appellant as to the illegality of the course pursued by the Deputy Magistrate in refusing his prayer to have the witnesses for the prosecution re-summoned with a view to his cross-examining them.

The Officiating Magistrate, in support of his order, urges (1) that, as the witnesses for the prosecution were examined on the same day the charge was drawn up, the accused might then have had them recalled; (2) that, when the witnesses on behalf of the prisoners were examined on 25th October, he did not, on that date, express any desire to have the witnesses for the prosecution recalled; (3) that it was only on 27th October, after the case had been completed, that he made such application, and even then alleged no special grounds for it; (4) that there must be reasonable grounds shown for such an application, and that, in this case, the accused was not prejudiced by its being refused.

The Magistrate is in error in supposing that the witnesses for the defence in this case were ever examined by the Deputy Magistrate, and has overlooked the fact that the Deputy Magistrate adverts in his judgment to the circumstance of no witnesses having been produced for the defence.

This misconstruction of the facts, however, does not touch the legal point involved in the case.

I submit that Section 218 of Act X. of 1872 does not leave it discretionary with the Court to recall the witnesses for the prosecution at the request of the prisoner.

The provision of the law is absolute, and not conditional, on reasonable ground being shown for the application.

The prisoner in this case never waived his right to have the witnesses recalled, and the ruling of the Honorable Court in W. R., Volume XVII., page 51, is exactly in point.

It was there laid down by the Honorable Chief Justice and Mr. Justice Ainslie that "a Magistrate cannot refuse to allow witnesses, whom he allowed to be cross-examined by the accused previous to the preparation of a charge, to be recalled and cross-examined after the accused has been put upon his defence under Section 252 of the Code of Criminal Procedure, treating them as witnesses for the prosecution."

I submit that there has been a material error in this trial by which the accused has been prejudiced; that the orders of the Deputy Magistrate and Magistrate should be set aside, and a fresh trial ordered.

Judgment of the High Court.

Kemp, J. We think the Sessions Judge is right. Section 218 of the Criminal Procedure Code enacts that an accused person "*shall* be allowed to recall and cross-examine the witnesses for the prosecution." It is not, under the law, necessary for the accused to show that he has a reasonable ground for exercising the right of recalling and cross-examining the witnesses.

The orders of the Deputy Magistrate and Magistrate are set aside, and a new trial ordered.

The 17th January 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Police-officer—Omission to give information—Act V. of 1861, Section 44—Act XLV. of 1860, Section 177.

(Miscellaneous Case.)

Syed Futteh Mahomed, *Petitioner.*

Messrs. C. Piffard and *C. Gregory* for the Petitioner.

Under Act V. of 1861, a police-officer is bound to communicate information to his superior officer regarding the commission of a riot affecting the public peace, and to make an entry thereof in the diary which he is required by Section 44 of that Act to keep, and the omission to give such information brings him within the purview of Section 177 of the Penal Code.

Glover, J.—THE accused is, or rather was, a Sub-Inspector of Police in charge of the Chowk Kullan Thannah, and he has been convicted under Section 29 of the Police Act and Section 177 of the Penal Code, and sentenced to three months' rigorous imprisonment. The Sessions Judge confirmed the Magistrate's order, and the case now comes before us under Section 294, Criminal Procedure Code.

It has been frequently held that this Court has no power to interfere on the merits of a case like this. The accused must show clearly that the conviction is wrong in law, before we can set aside the order complained of.

Now, both the Lower Courts have found as facts that there was a serious riot in which no less than three persons were wounded; that some of the rioters were sent in by the police to the thannah of which the accused was in charge; and that bail was taken from them by the accused. In the diary kept by Futteh Mahomed, and which refers to the events of the day in question, the riot is ignored, and mention only made of a petty assault concerning which the parties were told to complain themselves before the Magistrate, and no mention is made of bail having been taken from any one.

In his defence before the Magistrate, Futteh Mahomed alleged that he was ill at the time in question, and saw no one: that he signed the diary without making himself acquainted with its contents: and that no bail was taken from any one. The finding of the Courts below shows that this defence was false in every particular; but it is contended for the accused by his Counsel, Mr. Piffard, that Futteh Mahomed was not legally bound to furnish a diary to his superior officer, and that, in any case, there is no evidence whatever to show that the omission in that diary was the result of any intention on the part of the Sub-Inspector to deceive the District Superintendent, and that he had no reason to believe that the information supplied by him was false. Mr. Piffard also wished to draw a distinction between commission and omission, and contended that neglect of duty by omission to give information would not bring a police-officer within the purview of Section 177, Penal Code. This seems an altogether untenable objection, unless it could be shown that the Sub-Inspector was not legally bound to send information on matters connected with police-duties to his superior. If he was legally bound to give information, he would be legally bound not to omit to give such information, and such omission would make him punishable under the Section.

There can be no question, it seems to me, as to a police-officer's duty in a matter like this. By Section 44, Act V. of 1861 (the Police Act), every officer in charge of a police-station is bound to keep a general diary in which he is to record "all complaints and charges preferred, the names "of all persons arrested, the offences charged "against them," and, by Section 23, he is bound to communicate intelligence respecting the "public peace." If, then, there had been a riot in which several persons had been wounded, and regarding which information had been given at the police-station of

Chowk Kullan, Futteh Mahomed was legally bound to communicate such information to his superior officer, and to make an entry thereof in the diary which the Act ordered to be kept. If police-officers are to be at liberty to give or withhold information regarding the public peace at their pleasure, for this would be the result of not being legally bound to give such information, their appointments might as well be abolished at once.

But it is said that no evidence has been given to show that Futteh Mahomed had reason to believe that his entry in the diary that the case was one of common assault was false, that he might, on further enquiry, have satisfied himself that the alleged riot and wounding was a sham, and have, therefore, torn up the bail-bonds, and have considered himself justified in saying nothing more about the matter. Had this been so, the Sub-Inspector might have been exonerated from everything but a careless and ignorant discharge of his functions: but his case was entirely different He denied that he had seen any rioters at the thannah at all, and denied, moreover, that he had taken bail from any one. This must, on the findings of fact come to by the Courts below, be considered as a false defence, and I do not think that the Magistrate and Sessions Judge were wrong in law when they drew the inference that Futteh Mahomed acted, as he did, wilfully, and suppressed information which he was bound to have given, and which information he had no reason to believe was false, from an improper motive. I think that his case came properly within the meaning of Section 177, Penal Code, and that there is no error of law in the Lower Court's proceedings.

Kemp, J.—I also think we ought not to interfere in this case. The learned Counsel has made an entirely new case for his client. In the Court below, the appellant Futteh Mahomed stated that he was not present when the parties were brought to the police-station, and that he never took bail from them; he further admitted that he signed the diary without being aware of its contents. His defence was found to be false, a finding with which we cannot interfere as a Court of revision.

Under the circumstances, we think that the punishment (including the loss of his appointment), which the appellant has already undergone, is sufficient to meet the requirements of justice. We accordingly remit the remaining period of the sentence passed upon him.

The 19th January 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence—Oath—Municipal Commissioner—Illegality—Act VI. of 1872, Section 5—Act X. of 1872, Section 296.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Hooghly.

The Queen

versus

Tarinee Churn Bose, *Petitioner.*

Baboo Obhoy Churn Bose for the Petitioner.

Under Act VI. of 1872, Section 5, the omission to take any oath, or any other irregularity in the form in which it is administered, does not invalidate the proceedings.

The High Court declined to interfere, under Section 296, Act X. of 1872, with the order of a Municipal Commissioner, who was the editor of a newspaper, who had, prior to the disposal of the case, made very strong remarks on the case in the newspaper of which he was editor, holding that there was nothing illegal in his order, though he would have exercised a wise discretion if he had refused to sit as one of the Commissioners in the case.

Kemp, J.—The petitioner has been fined Rs. 10 under Bye-law 27 of the Serampore Municipality. The order runs thus: For obstructing a "public" nullah, which runs through his garden to and from the river, that he be ordered to clear out that portion of the nullah within thirty days from this date, subject to a penalty of four rupees a day thereafter for disobedience until the obstruction has been completely removed.

(Sd.) George Smith,
Second-class Magistrate.

Thakoor Dass Gossain,
Commissioner.

The Judge has referred the case to this Court under the provisions of Section 296 of the Code of Criminal Procedure, on the following grounds:—

1st.—That, according to the decisions to be found in Bengal Law Reports, Vol. I., page 41,* and Vol. XVIII., W. R., page 44, the order imposing a daily fine is illegal.

* 18 W. R., Crim., 41 (foot-note).

2nd.—That the evidence is not recorded on oath, the consent of the pleader for the accused not being considered by the Judge to be legally sufficient.

3rd.—That Mr. George Smith, one of the Commissioners who decided this case, as Editor of the *Friend of India* newspaper, was not competent to try the case, inasmuch as he had already prejudged it in the columns of that newspaper.

The Judge cites passages from the said newspaper of the 23rd October and 6th November. A passage from the same paper, dated the 27th November, written after the decision of the case, is also referred to by the Judge.

On the first ground of reference, we think that the daily fine for an offence which had not been committed is illegal (*Vide* Bengal Law Reports, Vol. I., page 44,* Criminal Rulings, which was followed in the case of W. N. Love, W. R., Vol. XVIII., page 44.)

With reference to the second ground of reference, we think that, under Section 5, Act VI. of 1872, the omission to take any oath, or any other irregularity in the form in which it was administered, would not invalidate the proceedings of the Municipal Commissioners.

On the third ground of reference, we think that Mr. G. Smith would have exercised a wise discretion in refusing to sit as one of the Commissioners in this case. Mr. Smith had, prior to the disposal of the case, made some very strong remarks in the *Friend of India*, of which paper he is admittedly the Editor.

Mr. G. Smith has also published some remarks of a highly improper character in the same newspaper after deciding the case as Municipal Commissioner, but we cannot say that Mr. G. Smith acted illegally, and we observe that he was assisted in the case by another Commissioner, Baboo Thakoor Dass Gossain. The fine of Rs. 10 under Bye-law No. 27 is strictly legal. It may be a question whether the nullah in question is a public nullah. The fact that the Municipal Commissioners choose to call it so in their order fining the petitioner will not prejudice the petitioner's title. No. 27 of the Bye-laws, which have been sanctioned by the Government of Bengal, and have, therefore, the same effect as if inserted in Act III. of 1864 (see Section 86 of the Act), enacts that no person shall, without the written permission of the Commissioners, set up any obstruction in "any" nullah or watercourse, and the Commissioners may order the removal of any such obstruction on grounds of public health. Penalty for infringement, Rs. 10. The petitioner does not allege that he has obtained the written permission of the Commissioners, and the Bye-law does not refer to a public or private watercourse. It distinctly states that the obstruction of any watercourse shall subject the offender to fine. The order imposing a daily fine must be set aside. The proceedings of the Municipal Commissioners in other respects are not interfered with.

The papers are returned to the Judge.

* 8 W. R., Crim., 44 (foot-note).

The 20th January 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

High Court—Jurisdiction—Procedure—Breach of the peace—Act X. of 1872, Section 530.

(Miscellaneous Case.)

Run Bahadoor Singh, *Petitioner.*

versus

Hur Doyal Singh, *Opposite Party.*

Mr. C. Gregory for the Petitioner.

Mr. C. Piffard and *Moonshee Mahomed Yusuff* for the Opposite Party.

An order passed by an Assistant Magistrate in a case of breach of the peace, under Section 530 of the Code of Criminal Procedure, was referred to the High Court by the Sessions Judge, with a recommendation that the order should be set aside on certain grounds stated, the want of jurisdiction in the Assistant Magistrate not being one of the grounds. The Division Bench, before whom that reference came, declined to interfere with the order. It was held by another Division Bench, before whom the matter was subsequently brought on motion, that they were not debarred from entering

into the question of the want of jurisdiction; and as the effect of the Assistant Magistrate's order was to prejudice one of the parties, the order which was admittedly without jurisdiction was set aside.

Kemp, J.—The opposite party in this case, Hur Doyal Singh, in January 1873, appears to have presented a petition to the effect that a breach of the peace was contemplated with reference to a dispute which existed respecting the lease of an 8½-anna share of Mouzan Inderpore. The police appear to have been directed to report in the matter, and the result of the enquiry was that there was no immediate prospect of a breach of the peace, but that, looking to the position of the parties, it was not improbable that the dispute would lead to a breach of the peace. Upon this, the Assistant Magistrate called upon Run Bahadoor and others to show cause why they should not enter into recognizances to keep the peace. The summons to Run Bahadoor Singh did not contemplate an enquiry under the provisions of Section 530 as to possession. On Run Bahadoor Singh's application to appear to show cause by mookhtar, he was permitted to do so, and the Assistant Magistrate thought proper to enter also into the question of possession. The Assistant Magistrate states that the parties expressed their consent that this should be done, and, therefore, although he had held no preliminary proceeding as required by law before a case can be brought under the purview of Section 530, he had proceeded, with reference to the consent of the parties, to adjudicate upon the question of possession, and there can be no doubt that the Assistant Magistrate has found that the opposite party, Hur Doyal Singh, is in possession. Upon this, Run Bahadoor Singh, the petitioner before us, there being no appeal against the order of the Assistant Magistrate, applied to the Sessions Judge of Gya to refer the matter to the High Court. The Judge thereupon referred the matter to this Court, being of opinion that the order of the Assistant Magistrate was illegal, and ought to be quashed for these reasons, namely, 1st, that the summons to Run Bahadoor Singh to show cause why he should not be bound down in recognizances to keep the peace mentioned a sum much less, or one-half of that which was eventually entered in the recognizance-bond; and, 2ndly, because the Assistant Magistrate had entered into the question of possession, without holding the necessary preliminary proceeding in the matter. The case, therefore, came before this Court upon a reference from the Sessions Judge of Gya. On the 16th of June 1873, the matter came before Justices Markby and Birch, and those learned Judges were of opinion that it was "quite possible that "there might have been, as the Judge says, "some informality amounting to irregularity "in the proceedings, but there is nothing "whatever to show us that the rights of the "parties have been in any way interfered "with. We think, therefore, that, in the "exercise of our discretion, we ought not to "interfere."

Subsequently, the matter was brought before another Bench, consisting of Justices Kemp and Pontifex, on the allegation that Justices Markby and Birch had declined to hear the pleader for Run Bahadoor Singh on the question of jurisdiction, which question was not in any way raised in the order of reference by the Sessions Judge of Gya. Justices Kemp and Pontifex granted a rule calling upon the opposite party, Hur Doyal, to show cause why the order of the Assistant Magistrate, dated the 6th February 1873, should not be set aside as passed entirely without jurisdiction. The case has now been fully argued by the learned Counsel on both sides. In a case like this, unless it were very clear that the point now raised was not included in the order of reference by the Sessions Judge, and was not argued before Justices Markby and Birch, we should have hesitated to interfere in the matter; but it appears to us manifest that the question which is now raised, and which is one of jurisdiction, did not in any way form the subject-matter of the order of reference, or of the argument before Justices Markby and Birch. It is admitted that Run Bahadoor Singh, who has acquired the property from Ismed Kooer, is the zemindar. It is also admitted that Hur Doyal Singh had held a ticca lease of a portion of this mouzah, which lease had expired. Hur Doyal Singh alleges that his lease has been renewed by the zemindar, and that fact is denied by Run Bahadoor Singh. From the statements put in by Hur Doyal Singh himself, it is clear, and this much was admitted by the learned Counsel, Mr. Piffard, who appears for Hur Doyal Singh, that the property in dispute is ijmalee property. Now, it has been ruled by this Court on several occasions that disputes regarding ijmalee property, namely, disputes with reference to the right of a party to collect the rents of a defined share on a joint-property, cannot form the subject of enquiry and decision under

Section 530. In those cases, the remedy and the course of action to be pursued in cases of that description is very clearly pointed out. It is also very clear that, in this case, the order of the Assistant Magistrate, which is an order passed entirely without jurisdiction, has greatly prejudiced the petitioner Run Bahadoor Singh. He is acknowledged to be the zemindar, and the question between him and his lessee is whether the lease was renewed or not That is a question which can be disposed of by the Civil Court. The order of the Assistant Magistrate, which was passed entirely without jurisdiction, unless set aside, will force Run Bahadoor Singh into the Civil Court as plaintiff with the onus upon him. Therefore, looking to the fact that the order was passed entirely without jurisdiction, and the title of Run Bahadoor Singh, as zemindar, has been greatly prejudiced by such order, we set aside the order of the Assistant Magistrate, dated 6th February 1873, as passed without jurisdiction.

Glover, J. –I concur in thinking that we ought to interfere in this case. The order of the Assistant Magistrate was admittedly passed without jurisdiction, and we ought not, I consider, to decline interference, merely because the point was not raised by the District Judge who made the original reference. It is clear that the Division Bench made their order on the Judge's reference alone, and were not asked to interfere on the question of jurisdiction. This point comes before the Court for the first time on the present motion.

It may be, I think, that we should not have been called upon to take any action in the matter, had not the petitioner been prejudiced by the Assistant Magistrate's order. Under ordinary circumstances, we might have said that the petitioner's neglect to urge this objection before the Lower Courts was a good reason for our declining to help him now. But, as Mr. Justice Kemp has pointed out, Run Bahadoor Singh is placed in a very disadvantageous position by the Assistant Magistrate's order. A party whose right he strenuously denies has been declared entitled to retain possession of the share in question, and, before he can get rid of this incumbrance, the petitioner, who is admittedly the proprietor of this land, will be obliged to undergo the trouble and expense of a civil suit. This being the result of the Assistant Magistrate's illegal order, I think we are bound to interfere, and set matters right.

The 26th January 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover.

Judges.

Jurisdiction—Magistrate—Dacoity—Act XLV. of 1860, Section 211.

(Miscellaneous Case.)

Kader Buksh, *Petitioner.*

Mr. C. Gregory for the Petitioner.

A Magistrate has no jurisdiction to convict in a case in which the accused is charged, under Section 211 of the Penal Code, with having falsely instituted a criminal charge of the offence of dacoity.

Kemp, J.—On the 8th of January instant, we sent for the record, and ordered notice to be given to the Magistrate. Mr Gregory, who appears for the petitioner Kader Buksh, points out that the petitioner has been convicted by the Magistrate of Purneah under Section 211 of the Indian Penal Code. That Section enacts that: "Whoever, with intent to cause injury to any "person, institutes, or causes to be instituted, "any criminal proceeding against that "person, or falsely charges any person with "having committed an offence, knowing that "there is no just or lawful grounds for such "proceeding or charge against that person, "shall be punished with imprisonment of "either description for a term which may "extend to two years, or with fine, or with "both; and if such criminal proceeding be "instituted on a false charge of an offence "punishable with death, transportation for "life, or imprisonment for seven years or "upwards, shall be punishable with imprison-"ment of either description for a term "which may extend to seven years, and shall "also be liable to fine." Now, the offence charged in this case is said to have been a false charge of the offence of dacoity—an offence punishable in some cases by death, and in others by transportation for life, or by rigorous imprisonment for seven years or upwards. An offence of this description is triable by the Sessions Court alone, and under Schedule IV. of the Code of Criminal Procedure, under the heading Section 211, the latter portion of it, it is clear that the offence charged namely, dacoity—being triable by the Sessions Court alone, the conviction and sentence passed by the Magistrate in this case are illegal, and must be annulled as passed without jurisdiction. This order will also apply to the case of the prisoner Ujyal, although he has not appealed to this Court.

The 26th January 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Attempt—Previous conviction—Punishment—Act XLV. of 1860, Section 75.

Committed by the Magistrate, and tried by the Sessions Judge of West Burdwan, on a charge of attempt at house-breaking by night in order to the commission of theft.

The Queen

versus

Damu Haree, *Appellant.*

Section 75 of the Penal Code is restricted to offences under Chapters XII. and XVII. of the Code of Criminal Procedure, when the term of imprisonment awardable is three years' imprisonment and upwards, and does not refer to an attempt to commit any of those offences, nor can any case be brought within it, merely because the punishment that may be given for it extends to three years and upwards.

Glover, J.—The prisoner in this case has been convicted under Sections 457, 458, and 511 of the Penal Code, and, in accordance with Section 75, has been sentenced to transportation for life, he having been previously convicted under the Penal Code of dacoity.

There can be no doubt, I think, of the man's having been caught in the act of breaking into a house by night, but I do not concur in the sentence passed by the Sessions Judge.

In the first place, I do not see how Section 75 applies. That Section refers to offences committed and made punishable, under Chapter XII. or XVII. of the Code, with imprisonment for three years or upwards, and not to an attempt to commit any of those offences. Penal statutes must be strictly construed, and it would not be right to include Chapter XXIII. within the purview of Section 75 when that Section only mentions other Chapters of the Code, and not the one relating to attempts. The Sessions Judge has, I think, mistaken the meaning of the words of the Section. They seem to me clearly to restrict the action of the law to cases under Chapters XII. and XVII. when the term of imprisonment awardable is three years' imprisonment and upwards, and not to allow of any case being brought within the Section, merely because the punishment that may be given for it extends to three years and upwards.

The prisoner has been convicted of attempt at house-breaking by night, having made preparation for causing hurt, &c., under Section 458, and the punishment might be, therefore, by Section 511, one-half of the longest period provided for the substantive offence. Now, under Section 458, the highest punishment awardable would be fourteen years' rigorous imprisonment with fine, so that, admitting the circumstances of aggravation in this case against the prisoner, the maximum punishment that can be inflicted on him is seven years' rigorous imprisonment.

I think that the Sessions Judge's sentence should be modified, and the prisoner be sentenced to seven years' rigorous imprisonment. I think, moreover, that this is a sufficient punishment, bearing in mind that the former offence, though technically dacoity, was really committed by a band of starving men, and that food was the thing robbed.

Kemp, J.—I concur.

The 27th January 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Abetment—Conspiracy—Act XLV. of 1860, Section 108.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of abetting a false charge with intent to injure.

The Queen

versus

Gobind Dobey and others, *Appellants.*

Mr. M. L. Sandel for the Appellants.

Under Explanation 5, Section 108 of the Penal Code, it is not necessary to the commission of the offence of abetment by conspiracy that the abettor shall concert the offence with the person who commits it. It is

sufficient if he engage in the conspiracy in pursuance of which the offence is committed.

Kemp, J.—In this case, the prisoner Gobind Dobey has been convicted under Section 211 of the Indian Penal Code, and has been sentenced to four years' rigorous imprisonment, and to pay a fine of Rs. 200, or, in default of payment of that fine, to suffer rigorous imprisonment for a further period of two years. The other prisoners, four in number, have been convicted of an offence under Section 211 and Section 109, that is, with abetment of the offence under Section 211, and they have been sentenced to two years' rigorous imprisonment, and to pay a fine of Rs. 50, or, in default of payment of that fine, to further rigorous imprisonment for one year. The case of Gobind Dobey, as observed by Mr. Sandel, is somewhat different from the case of the other prisoners We take his case first. Gobind Dobey undoubtedly charged Rambudun Singh and others with the murder of his brother Ramnidhee Dobey. That charge the assessors and the Judge have found to be false, and they have also found on the evidence of Rambudun Singh and other witnesses examined for the prosecution that Ramnidhee Dobey committed suicide by throwing himself off a precipice in the neighbourhood of the village. Considering that evidence, we see no reason to interfere with the finding of the Judge and assessors with reference to Gobind Dobey, with this exception that the term of imprisonment to which he has been sentenced in default of payment of the fine of Rs. 200 is not strictly legal. Under Section 65 of the Penal Code, the term of imprisonment in default of payment of a fine shall not exceed one-fourth of the maximum period of imprisonment fixed for the offence. Now, the maximum of imprisonment fixed for an offence under Section 211 is seven years Therefore, one-fourth of seven years would not be two years, and so far the sentence of the Sessions Judge is wrong in law, and must be amended. The prisoner Gobind Dobey will, in default of payment of the fine, suffer rigorous imprisonment for a further period of twenty-one months. With reference to the other prisoners, four in number, they have been convicted of abetting Gobind Dobey in bringing this false charge as against Rambudun Singh and others by conspiracy. Their conviction entirely depends, we may say, on the evidence of Mr. Charles, the District Superintendent of Police. This witness was not sent up with the other witnesses for the prosecution in the first instance, but was summoned by the Sessions Judge after the prisoners had been put upon their defence, and after Mr. Charles's examination, which was taken in the presence of the prisoners, they were called upon for a further defence, but they did not add anything to their former defence. Mr. Sandel, who appears for the prisoners, has very strenuously relied upon the vagueness of the evidence of Mr. Charles with reference to what these four prisoners stated before him with reference to the fact that Rambudun Singh had kicked the deceased Ramnidhee Dobey, and by that act caused him to fall over the precipice. We have carefully considered the evidence of Mr. Charles, and we do not find that the witness is at all vague or indistinct with reference to the statements made by these four prisoners: all that he says is that he cannot recall the precise Hindee term used by them for "rolling over" the precipice, but he distinctly says that these four prisoners stated before him that they saw Rambudun Singh kick Ramnidhee Dobey over the precipice, and that they gave their statements as eye-witnesses, and not as speaking from hearsay. We, therefore, think there is nothing vague or indefinite in the evidence of the District Superintendent.

Then, with reference to the offence of abetment, it is contended that it has not been legally made out in this case. We think it has. Under Explanation 5, Section 108 of the Indian Penal Code, it is not necessary to the commission of the offence of abetment by conspiracy, as in this case, that the abettor should concert the offence with the person who commits it. It is sufficient if he engage in the conspiracy in pursuance of which the offence is committed. Now, having found in concurrence with the assessors and the Sessions Judge that Gobind Dobey committed an offence under Section 211, and also finding, as we do, on the evidence of Mr. Charles, which has been properly relied upon, that these four prisoners did intentionally give false statements before him, aiding the statements of Gobind Dobey, which was clearly a false one, we think they have been rightly convicted. In their case, the additional term of imprisonment in default of payment of the fine is one year, and, as the maximum term of imprisonment fixed for the offence is seven years, the sentence of further imprisonment for one year in default of payment of the fine is not illegal. The sentence passed upon these four prisoners will, therefore, stand intact.

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The 28th January 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Sessions Judge—Commitment—False evidence—Act XLV. of 1860, Section 193—Act X. of 1872, Section 472.

Committed by the Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of giving false evidence.

The Queen

versus

Unnath Bundhoo Banerjee, *Appellant.*

Baboos Doorga Mohun Doss and *Grish Chunder Ghose* for Appellant.

Under Section 472, Code of Criminal Procedure, before a Sessions Judge can commit a person to the Court of Session, it is necessary that the offence should have been committed before the Sessions Court, and that it be one within the cognizance of, and triable exclusively by, that Court.

The offence of intentionally giving false evidence (Section 193, Penal Code), not being triable exclusively by the Sessions Court, is not one in which the Sessions Judge can commit.

Kemp, J.—The prisoner has been convicted, under Section 193 of the Indian Penal Code, of the offence of giving false evidence, and he was tried before the Court of Session of Zillah Dinagepore. The point taken in appeal is that, under Section 472 of the Criminal Procedure Code, the Sessions Judge of Dinagepore had no jurisdiction in charging the prisoner, and committing him upon that charge to take his trial before the Sessions Court. Section 472 enacts that the Court of Session may charge a person for any such offence committed before it or under its own cognizance, if the offence be triable by the Court of Session "exclusively," and may commit or hold to bail and try such person upon its own charge. Three things, therefore, must occur before the Court of Session can legally proceed, namely, that the offence be committed before the Sessions Court; 2nd, that it must be an offence within the cognizance of that Court; and, 3rd, that the offence be one triable by that Court "exclusively." Now, it is clear, on referring to the Schedule appended to the Criminal Procedure Code, that offences under Section 193 (that being the offence with which the prisoner before us has been charged) is not an offence exclusively triable by the Sessions Court. Therefore, it follows that the committal was without jurisdiction. It has been thrown out during the course of the argument that this defect might be cured by the provisions of Section 183 of the Criminal Procedure Code, but that Section refers to the finding and sentence passed by a Court of competent jurisdiction, and this not being a finding or sentence by a Court of competent jurisdiction, the last quoted Section in no way applies. We, therefore, quash the proceedings of the Sessions Judge, and direct the release of the prisoner.

Glover, J.—I concur.

The 28th January 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Recognizance—Breach of the peace—Act X. of 1872, Section 489.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Dacca.

Sahebdi

versus

Kuran and another.

No order requiring personal recognizance to keep the peace can be passed under Act X. of 1872, Section 489, unless the accused has been convicted of rioting or any other offence.

Reference.—The complainant charged the defendants with causing hurt to him. The Joint Magistrate disbelieved the story he

told, and dismissed the case, but remembering that the complainant had been beaten (and it was evident from the appearance of the defendants that they were lattee-men) said that he had little doubt that they took part in whatever disturbance took place, and ordered them to give a bail of Rs. 200 to keep the peace for one year; and the defendants, being unable to give this bail, are now in jail.

I am of opinion that the Joint Magistrate's order was not warranted under Section 489 of the Code or Section 491: and, moreover, that the order which is grounded on the unproved assumption of the Joint Magistrate is wrong in itself.

As the Joint Magistrate has left this district, I do not consider it necessary to call on him for an explanation.

Judgment of the High Court.

Kemp, J.—We concur with the Judge. The Joint Magistrate does not state the Section under which he calls upon the accused to enter into recognizances to keep the peace. If the Joint Magistrate proceeded under Section 489, his order is illegal, as the accused has not been convicted of rioting or any other offence; if under Section 491, the proceedings are also illegal, as the accused were not called upon to show cause, nor was any evidence recorded. The order of the Joint Magistrate is quashed.

The 28th January 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mischief—Act XLV. of 1860, Section 426.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Rungpore.

Shakur Mahomed (Accused), *Petitioner,*

versus

Chunder Mohun Sha (Complainant), *Opposite Party.*

In a case in which the accused was charged with having cut and carried away bamboos, the right to which was disputed, it was held that he could not be convicted of mischief under Section 426 of the Penal Code.

Reference.—It appears that the complainant, Chunder Mohun Sha, complained that the defendant Shakur Mahomed and others forcibly cut and removed certain bamboos that stood on his land. The defendant denied the charge, and urged that the bamboo-tope belonged to one Permananda Pyekar, who having leased it to Majitullah, the latter had the bamboos cut by his servants. The complainant Chunder Mohun also admits in his sworn statement that the accused persons cut and carried away the bamboos on the allegation of their right to them by purchase. The Deputy Magistrate, Tarinee Pershad Roy, considering the fact of the land on which the bamboos were situated being in possession of the complainant, and the defendant's having committed mischief by cutting and removing them proved, has convicted the defendant under Section 426 of the Indian Penal Code, and sentenced him to a fine of Rs. 10. Now, under the circumstances of the case as given above, I think the Deputy Magistrate has, in having convicted the defendant of mischief under Section 426, made an error in a point of law. The mischief of which the accused was convicted consists in cutting and taking away certain bamboos, the right to which was disputed. The essence of the offence of mischief is that the offender must cause the destruction of property or such change in it or in its situation "as destroys or diminishes its value or utility, or affects it injuriously." Now, as bamboo is a thing which is grown to be cut, the cutting and removing it does not amount to its destruction or other injury defined above. If there be any dishonest intention, the act of the offender in causing a wrongful loss to the complainant would amount to theft, and not mischief; but it seems to me clear from complainant's own statement and certain documents filed by the accused that there is a dispute regarding the title to the land on which the bamboos said to have been cut and removed were situated.

On these grounds, I think the order of the Deputy Magistrate convicting the accused of mischief is wrong in law, and should be set aside. I, therefore, submit the proceedings to the Hon'ble Court for such orders as they may deem fit.

The Deputy Magistrate having left the district before the case was taken up by this Court, no explanation has been called for from him.

Judgment of the High Court.

Kemp, J.—We concur with the Judge, and quash the conviction. The fine must be refunded, if paid.

The 5th February 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

High Court—Murder—Culpable homicide—Act X. of 1872—Section 280.

Committed by the Magistrate, and tried by the Sessions Judge of Sylhet, on a charge of culpable homicide not amounting to murder.

The Queen

versus

Shaikh Roheem, *Appellant.*

Under Section 280 of the Code of Criminal Procedure, the High Court altered the conviction in this case from culpable homicide into one for murder, and enhanced the sentence accordingly.

Jackson, J.—The prisoner, Shaikh Roheem, had been in the habit of ill-using his wife, the witness Banee Jan, who had been previously married to his brother, and whom he had married against her will on the brother's death.

The wife at last entreated her father to take her away, and the father accordingly came to the village for that purpose, accompanied by a cousin.

The prisoner, hearing that his wife's father had arrived, and surmising that he had been sent for by the wife, gave her another beating.

After dark, she set off with her father and cousin towards the father's house. The prisoner, on discovering her escape, immediately started in pursuit, accompanied by a neighbour named Soobundee, and armed with a heavy latee.

They overtook the fugitives, and attacked them. The wife gives a very clear account of what took place. Both men set upon the father with their latees, knocked him down, and beat him in the most brutal manner, inflicting several severe blows on the head, causing a double fracture of one arm, and breaking several ribs; so that his death occurred, either on the spot or very shortly afterwards.

The unfortunate wife and her cousin concealed themselves till morning.

Upon this evidence, the Sessions Judge of Sylhet has convicted the prisoner Roheem (the other man implicated appears to have absconded) of culpable homicide. He considers that the offence does not amount to murder, inasmuch as the prisoner acted immediately on grave and sudden provocation, *i.e.*, on the taking away of his wife.

The prisoner has appealed.

We see no reason whatever to doubt the truth of the evidence, and we are compelled to disagree entirely with the Judge, who finds, in the circumstances of this case, anything to reduce the prisoner's offence below that of murder.

It was certainly a murder of the most atrocious kind, and the previous circumstances, so far from raising a plea of provocation, either grave or sudden, add largely to the prisoner's guilt.

If the case had been before us under other circumstances, we should unhesitatingly have passed a sentence of death.

We avail ourselves of the powers vested in us, as the Appellate Court, by Section 280 of the Code of Criminal Procedure. We alter the finding of the Court of Session by finding the prisoner guilty of murder, and we enhance the punishment awarded, by sentencing the prisoner to be transported for life.

The 5th February 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Whipping—Previous conviction—Theft—Punishment—Charge—Act XLV. of 1860, Section 379—Act VI. of 1864, Section 7—Act X. of 1872, Section 439.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of committing theft.

The Queen

versus

Esan Chunder Dey, *Appellant.*

A sentence of whipping cannot, with reference to Act VI. of 1864, Section 7, be passed on a conviction for theft under Section 379, Penal Code, as the former Section only provides for sentences of imprisonment for a term not exceeding three years.

The fact of previous convictions should under Act X. of 1872, Section 439, be stated in the charge, when it is intended to prove them for the purpose of enhancing punishment.

The question of proof of previous conviction is one of fact which ought to go to the Jury, and must be determined by a Jury.

Ainslie, J.—THE record of this case was originally called up on a review of the Sessions statements of the district, and subsequently an appeal was lodged by the prisoner.

He was charged under Section 379 of the Indian Penal Code, found guilty by the unanimous verdict of a Jury, and sentenced by the Sessions Judge to transportation for life, and further to suffer 30 stripes.

The latter part of the sentence is directly in contravention of the provisions of Section 7 of Act VI. of 1864.

Section 379 of the Indian Penal Code only provides for sentences of imprisonment for a term not exceeding three years. It is evident that the Judge has treated this as a case falling within the provisions of Section 75 of that Code, and has inflicted the severest penalty which can be awarded under that Section.

The sentence appears to us wholly out of proportion to the offence; but there is another objection to it which prevents our dealing with the case by a final order. The Judge overlooked Section 439 of the Code of Criminal Procedure, which makes it necessary to state the fact of previous convictions in the charge, when it is intended to prove them for the purpose of enhancing punishment. It is stated by the Judge that the omission in the charge was not noticed by him till after sentence had been passed, when amendment was barred by the last words of that Section.

The question of proof of previous convictions is one of fact, which ought to have gone to the jury, and must be determined by a Jury. We think we should not meet the requirements of justice if we simply reduced the sentence to one for the maximum term prescribed in Section 379 of the Indian Penal Code, and we, therefore, set aside the sentence passed by the Judge on the prisoner, and direct him to draw up the charge in conformity with Section 439 of the Criminal Procedure Code, and to complete the trial of the prisoner on the charge so drawn before the same Jurors, after giving him an opportunity of making a fresh defence to that completed charge.

The 17th February 1874.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Magistrate—Mooktear—Act XX. of 1865.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Dinagepore.

Roopo Bewah

versus

Kekaroo.

A Magistrate has no power to suspend a mooktear under Act XX. of 1865.

Reference.—On the 14th ultimo, a woman, named Roopo Bewah, preferred a complaint before the Joint Magistrate of Dinagepore against one Kekaroo, charging him with having entered her house, and committed rape upon her: that she complained to the police, who would take no action in the matter; she, therefore, wished the Magistrate to take up the case.

In her deposition before the Joint Magistrate, she further added that she had had an intrigue with Kekaroo for some time, and was with child by him.

The Joint Magistrate, after taking the woman's deposition, dismissed the complaint, being of opinion that the woman, an ignorant person, had evidently been put up to lay a case of rape without any foundation. The Joint Magistrate further ordered that "the mooktear Bhaol Chunder, who wrote her petition, be suspended for two months."

The Joint Magistrate has, by this order, suspending the mooktear, clearly usurped the functions of the High Court (*see* Section 16, Act XX. of 1865), and I beg to recommend that the order be quashed.

A letter from the Joint Magistrate, No. 189, dated 20th ultimo, will be found with the record, in which he explains that he acted under the power given him by Section 186, Code of Criminal Procedure. In that case, his order is opposed to High Court's Circular No. 13, dated 29th August 1870.*

Judgment of the High Court.

Kemp, J.—The order of the Joint Magistrate is quashed. That officer had no power to suspend the mooktear under Act XX. of 1865.

* 14 W. R., Crim. Cirs. 5.

The 17th February 1874.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Commitment—Sessions Judge—Cheating—Forgery—Act XLV. of 1860, Section 494—Act X. of 1872, Sections 4 & 296.

(Miscellaneous Case.)

Joy Kurn Singh and another, *Petitioners,*

versus

Man Patuck, Karpardaz of Mussamut Sookbharee, *Opposite Party.*

Mr. R. T. Allan and *Baboos Nilmadhub Sein* and *Hurrihur Nath* for the Petitioners.

Mr. C. Gregory, Mr. M. L. Sandel, Baboos Chunder Madhub Ghose and *Boodh Sein Singh,* and *Moonshee Mahomed Yusoof* for the Opposite Party.

An order of commitment by a Sessions Judge under Section 296 of the Code of Criminal Procedure is bad in form, if it does not specify the offence for which the parties are to be committed for trial to the Sessions.

A trial for the offence of cheating is not a Sessions case within the meaning of Section 296, having regard to the first portion of the definition of Sessions case in Section 4 of the Code, which must be read as if the word "only" followed the words "triable by a Court of Session."

A misrepresentation by false description of one's position in life falls under the heading of cheating, and not under that of forgery. Where, therefore, a document purported to have been signed by G. L., putwaree, and it was said that it was signed by G. L., but at a time when G. L. was not a putwaree, it was held that the document was not a forgery within Section 464 of the Penal Code.

Ainslie, J.—This is an application to quash a commitment directed by the Sessions Judge of Gya under Section 296 of the Criminal Procedure Code. In Section 197 of that Code, it is laid down that a commitment once made by a competent Magistrate can be quashed by the High Court only, and only on a point of law. The order of the Sessions Judge, which is before us, is undoubtedly bad in form, in so far that it does not specify the offence for which the parties are to be committed for trial to the Sessions, and it appears to us that, as the order stands, the Magistrate will have no means of carrying it out. In a case reported in the 19th Volume, Weekly Reporter, Criminal Rulings, page 30, a similar defect in the order of commitment was pointed out by Mr. Justice Phear, who delivered the judgment. But, when this case goes down again to the District Court, there is nothing

to prevent the Sessions Judge from amending his former order, or making a new order, if he can make any order at all in this case. Therefore, it is necessary for us to go on and consider whether any order for commitment to the Sessions can properly be made. In the case that I have quoted before, it is laid down that a commitment made by the Sessions Judge under Section 296 must be for some offence appearing on the proceedings of the Magistrate. In this instance, the offences, as appearing on the proceedings of the Magistrate, are cheating and forgery. Then, Section 296 declares that, in Sessions cases, the Court of Session may order a commitment. It, therefore, becomes necessary to consider whether a trial for the offence of cheating is a Sessions case within the meaning of that Section.

A "Sessions case" is defined in Section 4 as follows: "A 'Sessions case' means and "includes all cases specified in column 7 of the "4th Schedule of this Act as cases triable by "the Court of Session, and all cases which "Magistrates commit to the Court of Session, "although they might have tried them themselves." If the offence of cheating in this instance is a Sessions case at all, it must be so under the first portion of the definition, but it appears to us that it is not so, and that the definition which I have just read must be understood as if the word "only" followed the words "triable by a Court of Session;" because, in the following Clause, which defines "Magistrate's cases," all cases which may be committed to the Sessions, but which are also triable by the Magistrate, and are so tried, are declared to be "Magistrate's cases." The same view of the meaning of the expression "Sessions cases" has been taken by the High Court of the North-Western Provinces in the case of The Queen *v.* Sitol Pershad.

It has been said, in support of the order of the Sessions Judge, that, as a matter of fact, the Magistrate has dealt with this case as one coming within the provisions of Chapter XV. On looking over the proceedings, we find no express declaration by the Magistrate as to the procedure which he intended to adopt, and there is nothing in the proceedings from which we must necessarily imply that he was proceeding under that Chapter or under Chapter XVII., and it is quite possible that he may have been proceeding under either Chapter. No doubt, if he was proceeding under Chapter XVII., the record is imperfect, inasmuch as it contains no formal charge against the accused; but in respect of this imperfection, Mr. Allan, for the petitioner, relies on the first explanation under Section 216, and the last Clause of the explanation given under Section 220, Criminal Procedure Code. Under such circumstances, we should generally be inclined to give the accused the advantage of the doubt, and to hold that, as the Magistrate had jurisdiction to try him, and pass a final order, he must be held to have completely tried and acquitted him. A similar course seems to have been adopted by a bench of this Court in a case reported in the 18th Volume, Weekly Reporter, page 10. In this particular instance, we are the more inclined to do this, as this is substantially an attempt to try in a Criminal Court the question whether a certain contract is binding on the complainant or not—a matter which ought properly to be tried, and can only be satisfactorily tried, in a Civil Court.

It may turn out hereafter that the accused ought to be prosecuted and convicted, and in such case the result possibly will be that a trial and conviction is barred by this order; but if any difficulty in doing complete justice arises in this case, it will arise entirely from the mode in which the complainant has conducted it.

Then, seeing that the order for commitment cannot be sustained on a charge of cheating, it becomes necessary to determine whether, in fact, there is any forgery at all within the definition of forgery as given in Section 464 of the Penal Code. If there is a forgery, no doubt, the order for commitment is good, but if the misrepresentation, assuming that there has been a misrepresentation, by Gunput Lal and Joy Kurn, though in writing, does not amount to forgery, the commitment is bad. Under Section 463 of the Code, the making of a false document with intent to cause any person to enter into any express or implied contract is forgery. In Section 464, the making of a false document is defined; a person is said to make a false document who dishonestly or fraudulently makes, signs, seals, or executes a document with the intention of causing it to be believed that such a document was made, signed, sealed, or executed by, or by the authority of, a person by whom, or by whose authority, he knows that it was not made, signed, sealed, or executed, or at a time at which he knows that it was not made, signed, sealed, or executed. It is not necessary to refer to the remainder of the Section. Now, with reference to the first part of this definition, we see that the alleged false document was a certain

jummabundee, purporting to be drawn out and signed by Gunput Lal, putwaree. If the story for the prosecution is true at all, this document was made and signed by Gunput Lal, but it is said that Gunput Lal was not putwaree at the time, and that, by assuming to himself the character of putwaree, and signing as putwaree, he has committed a forgery: and the second explanation under Section 464 has been referred to as supporting the charge, in this way that the assigning to him the character of putwaree was equivalent to the making of a false document in the name of a fictitious person. I must say that the words of the explanation do not seem to me to go so far as this, and that the illustration which follows it distinctly shows that such a meaning ought not to be put upon it: and on referring to Sections 415 and 416, in the first illustration under each of these Sections, I find that misrepresentation by false description of one's position in life is distinctly provided for under the head of cheating. It seems to me, therefore, that the document cannot be said to be a forgery under the first part of Section 464.

Then comes the question whether, in consequence of a mis-statement as to time, it can be said to be a forgery. Now, the papers (the jummabundees) themselves are not dated. No doubt, they are, at first sight, calculated to convey the impression that they were made at the close of the successive years to which they refer, but there really is nothing on the face of them which ties down the writer to any particular time as the time at which they were drawn out. Moreover, it appears to me that the matter of the date of these documents is not a material part of the fraud (if there is fraud), as it is in the illustrations (*h*) under the first part of the Section, and (*d*) (*e*) under the first explanation in the same Section. Supposing that these jummabundees have been fraudulently prepared, they amount to a misrepresentation in writing of the value of the property with the view of obtaining better terms from the person proposing to take a lease, and this may amount to cheating; but, looking at the terms of Section 464, we are of opinion that they cannot be said to amount to forgery. The consequence is that the matter was not one coming within the definition of "Sessions case," and therefore the Sessions Judge, under Section 296, had no power to make an order of commitment.

We accordingly set aside that order, and direct that, in respect of these charges, the accused be released.

The 18th February 1874.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

High Court—Procedure—Magistrate—Jury—Act X. of 1872, Sections 297, 528.

(Miscellaneous Case.)

Rajah Shatyanundo Ghosal, *Petitioner,*

versus

The Camperdown Pressing Company, Limited, *Opposite Party.*

Mr. J. H. A. Branson and *Baboo Brojonath Milter* for Petitioner.

The Advocate-General for Opposite Party.

A Magistrate, acting under Act X. of 1872, Section 523, should exercise his own independent discretion in selecting the members of the Jury, and the persons so selected by him should not be nominees of the party interested in upholding the Magistrate's order.

In this case, the High Court, sitting as a Court of revision, under Section 297, Act X. of 1872, set aside the order of the Magistrate appointing to the Jury persons who had been appointed by the opposite party, as it held that the error of procedure was a material one, inasmuch as the merits of the case had been thereby affected.

Glover, J.—We think that this is a case in which the High Court should exercise its powers of revision under Section 297.

On the Rajah applying for a Jury under Section 523, the Joint Magistrate called upon him to nominate two members, and wrote to the Petitioner Company through its attorneys, Messrs. Berners, Sanderson, and Upton, desiring the petitioner to "suggest" the names of two persons to serve on the Jury. Messrs. Berners and Co., in reply, "*nominated*" Messrs. Nicholl and Watson, and the Joint Magistrate thereupon appointed those gentlemen, with Mr. Ryland as foreman of the Jury.

Now, Section 523 requires that the Magistrate shall nominate one-half of the members of a Jury appointed under this Chapter of the Procedure Code together with the foreman, and we understand this to mean that the Magistrate shall exercise his own independent discretion in selecting persons to serve, and that the persons so selected should not be "nominees" of the party interested in upholding the Magistrate's order. By Section 523, the applicant for a Jury has the advantage (and rightly so, considering his position) of nominating his

own Jurymen, an advantage not given, and not meant to be given, to the other side; but this advantage is altogether lost, if the applicant's opponents are allowed to usurp the Magistrate's functions, and nominate their own Jurymen. In this case, no doubt, the Company were called upon to "suggest" names only, but it is equally certain that they went far beyond that, and "nominated;" and we do not think that persons so nominated, although afterwards appointed by the Magistrate, can be fairly said to be the Magistrate's "nominees," which the law requires them to be.

We should not, however, be disposed to give the applicant Rajah the benefit of a technical objection, were we not very decidedly of opinion that the finding of the majority of the Jury was against the evidence. The only witness who deposes in favor of the Company is Mr. Thomson, and his evidence is of the vaguest description. He has known the road for 2½ years, and is of opinion that it is a public one, because he has seen men using it during that period without hindrance.

The other witness, Jugobundoo Nundee, considered the part of the road in dispute not to be public, because the municipality had never repaired it. The metalled portion this witness considered public.

This is the only evidence adduced by the Company to prove that the road was public, and it manifestly falls far short of what is required.

On the other hand, there is the evidence of the original owner of the land, Mr. Manockjee Rustomjee, and of other witnesses, to the effect that the road always was, and is now, private property. That it was so, whilst the land was in the occupation of Manockjee Rustomjee, seems undoubted.

Of course, there may be other evidence forthcoming to show that the road has been always used as a public road, but on what has been recorded up to this time, we should say that the verdict ought to have been the other way.

We think, therefore, that the error of procedure which the Joint Magistrate undoubtedly fell into in the appointment of the Jury was a "material" one, inasmuch as the merits of the case have been thereby affected; and we think further that we ought to quash the verdict of the Jury as having been come to by persons not legally appointed to give that verdict.

The Joint Magistrate should be directed to nominate other Jurymen, and to call upon the applicant Rajah to do so also, and then to appoint the whole with their foreman to enquire into and decide upon the reasonableness of the original order passed by him.

The 18th February 1874.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Procedure—Complaint—Enquiry—Warrant—Act X. of 1872, Section 146.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Magistrate of Rajshahye.

Ramkant Sircar

versus

Jadub Chunder Dass Byragee.

The previous enquiry provided for by Section 146, before a complaint is taken up, ought not to be made after the accused has been brought before the Court under a warrant.

Jackson, J.—The proceedings of the Deputy Magistrate in this case are undoubtedly irregular, and the order which he has passed, discharging the accused under Section 215 of the Code of Criminal Procedure, is illegal. It might be that we should not feel ourselves called upon to interfere and reverse this order, if it were not that the proceedings are open to unfavorable comment on other grounds. There was made before the Deputy Magistrate, on the 25th November 1873, a complaint that certain persons named, accompanied by 17 others, had come and forcibly cut rice grown upon 7 beegahs out of 40 beegahs which the complainant had in his jote, which rice the complainant said he had sown. Thereupon the Deputy Magistrate ordered that the case should be heard further on the 2nd December, on which date certain of the accused were to appear. The accused did appear on that date, but the complainant's witnesses were not in attendance. Thereupon, the 5th December again was fixed for the hearing. On that day, the complainant was examined upon oath, and the defendant was also examined, but, instead of proceeding to examine the witnesses who were in attendance, the Deputy Magistrate adjourned the case, and directed the local police to compare certain survey-maps tendered by the parties, to make a map of the scene of dispute, and to report what party had been in possession of the land. Thereupon the

and police-officer went to the spot, and made the enquiry; and he says that, by the aid of a certain survey-amlah, he prepared the map, which the Deputy Magistrate describes as a very "neat plan exhibiting the locality of "the disputed land." The complainant objected to the report of the Police-Sub-Inspector, which was unfavorable to him; he objected to the admissibility of the map, and insisted that his witnesses should be heard. The Deputy Magistrate dealt with his objections in these words: "The objection made "by complainant to the Sub-Inspector having "got another man to draw out the plans and "measure the ground is a very stupid one; "for, if the Sub-Inspector had not obtained the "services of a competent surveyor, and had "done the whole with his own hands, it "would have afforded the complainant, who "is worsted by it, a grand foundation for "discrediting the whole proceedings of an "ignorant police-officer." Now, the complainant manifestly had a very good ground of objection to this map, *viz.*, that it had been drawn by some person who was not a witness, who was not before the Court, and who was not a public officer employed for that purpose, and that there was no evidence whatever to show that the map was correct. In this state of things, it appears to me that the complainant's objection did not deserve to be characterized as stupid. The Deputy Magistrate says: "The next objection is almost as unreason-"able that, because the Sub-Inspector has "found that the disputed land had been culti-"vated by the complainant, the Court is "bound, with its eyes closed, to punish the "accused for theft, and thus to confirm the "previous nefarious act of the complainant "in taking possession of the land belonging "to Akhoondpore." If, however, "there was "no knowledge, as here obtained, by a care-"ful comparison of survey-plans in the "presence of interested parties of both sides "to which mouzah the land belonged, then "the Court would have been obliged to go by "mere fact of cultivation," that is to say, the Deputy Magistrate, who had some sort of evidence before him that the land had been cultivated by the complainant, makes it his duty to overlook that fact, and enter into the question whether the land belonged to the mouzah of the complainant or of the defendants. He goes on to say: "Such an "error and injustice cannot be perpetrated, "or else for what purpose was this point to "be ascertained, but to dispose of the quarrel "once and for ever without driving either "party to further litigation in the Civil "Courts. And now that the parties know "their ground, it is hoped there may be no "further wilful cutting of each other's "crops." He thus undertakes to settle once for all a civil dispute between the parties, and, having done that, he refuses to enter into the criminal complaint. It appears to me that the Deputy Magistrate has altogether mistaken his duty. It was his business to enquire, under the prescribed procedure into the charge before him, to hear the evidence adduced by the complainant, and to pass such legal order as the case required. It was no doubt open to him, after the complainant had been examined, to dismiss the suit, if he saw there was no sufficient ground for proceeding under Section 147; but this he did not think fit to do, and, as the case now stands, it is his duty, under the Criminal Procedure Code, to hear the evidence, and dispose of the complaint.

Ainslie, J.—The Deputy Magistrate has not observed the distinction between proceedings under Chapter XI. of the Criminal Procedure Code and under Chapter XVII.

When the complaint first came before him, it was open to him to proceed under Sections 146 and 147.

After issuing his warrant, and bringing the accused before the Court, he was bound to go on with the trial, and hear the case for the prosecution; it was too late for the *previous* inquiry provided for by Section 146.

The orders of the Deputy Magistrate must be set aside, and he be directed to hear the evidence offered by the complainant, and to dispose of the case according to law.

The 4th March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Jurisdiction—Bench of Magistrates.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Magistrate of Nuddea.

The Queen

versus

Dwarkanath Mullick.

The High Court declined to interfere with a conviction by a Bench of Magistrates which appeared good,

on the statement of the Magistrate that the case was one in which the Bench had no jurisdiction, according to rules prepared by the Magistrate, and approved of by the Local Government, which rules were not before the High Court.

Phear, J.—In this reference, the Magistrate of Nuddea states his opinion that the conviction which has been arrived at by the Honorary Bench of Magistrates is bad for want of jurisdiction. He says: "In the rules "for the guidance of Benches framed by "me, and approved of by the Lieutenant-"Governor, I gave the Kishnaghur Bench "jurisdiction to try cases in the sudder "thannah of this district. In the present "instance, the offence is said to have been "committed in the village of Dahakulla in "the Thannah of Nakashipara. The trial "was, therefore, without jurisdiction."

We have not been furnished with the rules to which the Magistrate refers; and we do not entirely understand how rules framed by the Magistrate could have conferred jurisdiction on the Bench, because, according to Section 50 of the Criminal Procedure Code, the limits of the jurisdiction of the Benches are to be determined by the order of the Local Government, and the rules which the Magistrate of the District has to frame for the guidance of Benches, and which themselves ought to be approved of by the Local Government, are rules of a totally different character, and are the subject of another Section, namely, Section 52 of the same Act. But, however this may be, we have nothing but the bare statement of the Magistrate himself made in his letter of reference to support the position that the conviction made by the Kishnaghur Bench, which has been referred to us, was without jurisdiction. On the face of the judgment passed by the Bench, it appears to be entirely good; and we cannot, in the absence of proper materials, come to the conclusion that it was made without jurisdiction, and upon that ground quash it.

We observe, moreover, that the conviction was made on the 8th December, and this reference to the High Court is dated the 20th February. No explanation whatever is given for this dealy. On the whole, we see no ground upon which we can rightly interfere.

The 7th March 1874.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Irregularity—Jurisdiction—Investigation—Act X. of 1872, Section 70.

(Miscellaneous Case.)

Grish Chunder Roy and others. *Petitioners.*

Baboos Doorga Mohun Dass and *Ishur Chunder Chuckurbutty* for the Petitioners.

Under Section 70 of the Code of Criminal Procedure, no sentence or order of a Criminal Court is liable to be set aside, merely on the ground that the investigation, inquiry, or trial was held in a wrong district or session division, unless it is proved, or appears that the accused person was actually prejudiced in his defence.

Ainslie, J.—The first question in this case is whether the Deputy Magistrate of Goalundo, in the District of Furreedpore, had jurisdiction over the land on which trespass is alleged to have been committed. We have had some difficulty in attempting to ascertain the exact boundary of the districts, but it is unnecessary to determine this, because the case is distinctly provided for by Section 70 of the Criminal Procedure Code, which says that no sentence or order of a Criminal Court shall be liable to be set aside, merely on the ground that the investigation, inquiry, or trial was held in a wrong district or session division, unless it is proved, or appears, that the accused person was actually prejudiced in his defence. There does not appear to have been any prejudice whatsoever in this case. There was nothing to prevent the accused persons from bringing before the Deputy Magistrate of Goalundo all the evidence which they might have brought before the Magistrate of the District of Pubna. Then, with reference to the propriety of the conviction on the evidence, we think that, on the findings of fact of the Court below, we ought not to interfere. The finding of possession, on which the petitioners rely, is clearly a finding to this effect, that the petitioner, in order to give color to his claim to possession, had wrongfully gone upon the land, and scattered seed thereon.

The application must be rejected.

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The 9th March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Procedure—Sessions Judge—Trial.

Committed by the Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of dacoity.

The Queen

versus

Gopi Noshyo and others, *Appellants.*

In a case of several prisoners who were tried by a Sessions Court consisting of a Judge and assessors, the latter convicted them, which finding was recorded by the Judge. The Judge, however, postponed giving judgment, and left the district without recording his finding or his judgment, and the Judge's successor, after considering the evidence which had been taken before his predecessor, convicted and passed sentence on the prisoners.

HELD that the conviction was not valid, and the trial had not been completed. The High Court, accordingly, set aside the conviction, and ordered the re-trial of the prisoners upon the charges upon which they were committed for trial.

Phear, J.—WE are of opinion that the conviction and the sentence must be set aside, on the ground that the conviction was made, and the sentence passed, by a Judge who was not the Judge of the Sessions Court which tried the prisoners. The Judge who made the conviction and passed the sentence says:—

"In this case, nine prisoners came up for "trial before my predecessor at the July "Sessions. Of these, six were convicted of the "charge of dacoity, and sentenced to 10 "years' rigorous imprisonment each. With "respect to the remaining three prisoners, "Gopi, Akhir, and Hazari, their witnesses "not being present, the case was postponed to "the September Sessions for their attendance. "At the September Sessions, these witnesses "appeared, and deposed that they knew "nothing on behalf of the prisoners. My "predecessor, therefore, consulted the assess- "ors, who were unanimous in finding these "three prisoners also guilty.

"This finding of the assessors was "recorded by my predecessors on the 5th "September. He did not, however, record "his own finding, nor record any judgment, "the reason being (so I am informed) that "the records of the original case were then "before the High Court in appeal, and my "predecessor wished to refer to the record, "before passing judgment."

The Judge then goes on to consider the evidence on the record which was taken before his predecessor, and not before himself, and arrives thereon at the conclusion that these three prisoners are guilty of the charge of dacoity, which was made against them.

And, finally, he records that the Court, concurring with the assessors, finds that Gopi Noshyo, Akhir Noshyo, and Hazari Noshyo, are guilty of the offence specified in the charge, namely, that they have, on or about the 2nd June 1873, committed dacoity, &c.

It thus appears that the prisoners were tried by a Sessions Court consisting of a Judge and assessors; that the assessors came to a finding of guilty; and that this finding was formerly recorded; but that the Judge postponed giving his own judgment, and never did, in fact, give it. And, therefore, the Court which actually tried the prisoners did not give a complete final judgment and sentence. The conviction which has been arrived at, and the sentence which has been passed, have been pronounced by a Judge who was a stranger to the actual trial, and who merely succeeded as Sessions Judge of the district, the learned gentleman before whom the case was tried. We are of opinion that this conviction, so arrived at, is not a valid conviction, and that the trial of the prisoners has not been completed.

The conviction and sentence must, therefore, be set aside, and the prisoners must be re-tried upon the charges upon which they were committed for trial.

The 10th March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Procedure—Conviction—Further evidence—Trial.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Moorshedabad.

The Queen

versus

Ramdoyal Mahara.

A valid conviction arrived at by a Magistrate who had jurisdiction in the matter cannot be set aside, simply

because, subsequent to the trial and conviction, fresh evidence has been discovered, which may tend to convict the accused of an offence other than that for which he was convicted.

Reference.—At the instance of the Convicting Officer, I have the honor to report the accompanying case to the High Court for orders.

The convict, Ramdoyal Mahara, having been convicted by the Joint Magistrate of Lalbagh under Section 457, Indian Penal Code, appealed to this Court.

Before the appeal was opened by his pleader, the Government Pleader submitted that he was instructed to move the Court to quash the conviction, because of the discovery of facts subsequent to conviction going to show that the convict's offence had, in reality, been dacoity.

Upon that, this Court made the order with the record annexed.

The case is now submitted with the records, in order that the High Court may quash the conviction under Section 297, Criminal Procedure Code, or pass such order as may appear proper.

I may observe that expedition is desirable, in order that the convict, if re-tried, may be committed to the Sessions with his accomplices.

It is presumed that evidence of previous conviction will be forthcoming at the Sessions trial.

Judgment of the High Court.

Phear, J.—It appears to us that the conviction which we are asked in this reference to set aside is good and valid in law. The Magistrate who made it had jurisdiction to entertain the charge, and the evidence before him was sufficient to establish it. It may be that additional evidence has since come into the power of the prosecution which, if it had been adduced before the Magistrate, would have led him to consider that some offence had been committed by the prisoner, other than that of which he has been convicted. But this fact does not afford a ground upon which we should be justified in law in setting aside a valid conviction come to by a competent Court. And we need hardly point out that there might be considerable risk, if we did so, of the purposes of the prosecution not being served; for it is perfectly possible that, on a new trial for the new offence, the prisoner might succeed in satisfying the Sessions Court that the prosecution had not made out a case against him.

We decline to interfere in this case.

The 11th March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Evidence—Statements of accused persons.

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Chota Nagpore, on a charge of rioting armed with deadly weapons, &c.

The Queen

versus

Khukree Ooram and others, *Appellants.*

Baboo Taruck Nath Sein for the Appellants.

Where the only evidence for the prosecution was that of witnesses whom the Judicial Commissioner considered unworthy of belief, it was held that the prisoners, who were charged with rioting, ought not to have been convicted on the statements of the opposite party, who were also charged with rioting, such statements not being evidence against the accused in this case.

Phear, J.—In this case, the six prisoners, Khukree and five others, have been found guilty by the Judicial Commissioner of an offence punishable under Sections 148 and 326 of the Indian Penal Code, and have, two of them, namely, Khukree and Etwa, been sentenced to two years' rigorous imprisonment, and the remaining four to one year's rigorous imprisonment.

The Judge says that the evidence given on the part of the prosecution consists of the testimony of three men, Sona, Asa, and Bhoopal. He says: "These men are the "only witnesses for the prosecution. They "assert that, from a distance, they saw the "Kols attack the Tewaris' men, whom they "followed up for a considerable distance, and "one man they killed on the spot. But "since it has been clearly shown that these "men are mere creatures of the landlord, "for whom they have been standing wit-"nesses in several suits, and who themselves "had preferred and supported a criminal "charge against Khukree and other Kols, "no reliance whatever can be placed on their "statements. Moreover, it is in evidence "that they all then were charged by the "Kols with having been present and taken "part in the riot, and since they kept out of "the way till the Saturday after the fight, "though the police were on the spot, "seeking for information from the evening "of the previous Tuesday, there are good

grounds for believing the truth of the accusation against them."

The Judicial Commissioner, having thus in effect said that the case of the prosecution is entirely false, afterwards also says that the defence set up by these prisoners "is manifestly false. The story of the dacoity in the house of Khukree is evidently put forward as an excuse for the savage acts of this party. The plea of self-defence is not admissible in their case. Instead of appealing for protection to the police, all the Kol ryots of the village, combined under the leadership of Khukree, took the law into their own hands, and, not being content with merely protecting their leader from the illegal acts of the landlord's servants, they made a most violent onslaught on them, wounded two men severely, and two slightly. The death of Panchoo Jolah cannot safely be attributed to them, as the medical evidence shows that the man was weak, and had a diseased spleen, the rupture of which caused death, and such rupture might have been caused by a fall, as the man was running away. The second party" (that is, the appellants before us) "are, therefore, guilty of rioting armed with deadly weapons, and of having caused grievous hurt. The charge of culpable homicide is not brought home to them."

But there is no evidence whatever upon the record of the facts here found by the Judicial Commissioner as having occurred, excepting the testimony of the very three witnesses for the prosecution, who, he had said, are absolutely unworthy of belief.

The members of the first party, who are also charged with rioting, did, no doubt, individually make statements in the dock and before the Magistrate, which appear to put the case very much in the way in which the Judicial Commissioner has found that it occurred. But these statements, we need hardly say, are not evidence against the appealing prisoners. And, inasmuch as the only evidence against these prisoners is, according to the opinion of the Judicial Commissioner himself, entirely unworthy of credit, it seems to follow that they ought to have been acquitted, and not convicted of the charge which was made against them. This is a regular appeal, and, no doubt, it devolves upon us to consider the value of the evidence which is on the record. We have carefully gone through the testimony of the three witnesses of whom the Judicial Commissioner speaks, and who came to support the case of the prosecution, and we are entirely disposed to take the view of their evidence which the Judicial Commissioner took. It is very plain from the depositions of these men that their story cannot be trusted, and it seems to us, indeed, as the Judicial Commissioner has remarked, extremely probable that they were themselves members of the Tewaris' party; the story which they tell, making themselves purely innocent spectators, is a false story. We, therefore, think that the conviction in the Court below must be set aside, and the prisoners acquitted.

The 16th March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Sessions Judge—Evidence—Act X. of 1872, Section 249.

Reference to the High Court, for confirmation of the sentence of death, by the Sessions Judge of Rungpore.

The Queen

versus

Amanullah, *Prisoner.*

Baboo Bhuggobutty Churn Ghose for the Prisoner.

In a case in which the accused was charged with murder, the Sessions Judge considered the evidence given before him by the witnesses for the prosecution to be false, but nevertheless convicted the accused, acting under Section 249 of the Code of Criminal Procedure, and relying on the evidence which had been given by the same witnesses before the Committing Officer.

HELD that Section 249 did not apply to this case; that the discretion conferred by that Section should be exercised upon substantial materials, rightly before the Court, and reasonably sufficient to guide the judgment of the Court to the truth of the matter, and not upon mere speculation or conjecture; and that, under that Section, a Judge may base his judgment on the evidence given before the Magistrate in the presence of the accused, when there are special and particular reasons for considering that evidence to be honest and true, and when that evidence is to a certain extent corroborated by independent testimony before himself.

Phear, J.—IN this case, the prisoner Amanullah has been found guilty of the crime of having murdered his wife Budhu and his daughter Koreemun, and he has been sentenced to death.

The theory of the prosecution is that the prisoner, his wife Budhu, her own child Koreemun, about twenty months old, and an elder daughter of the prisoner by a former

wife, Asherun, who was about ten years old, lived together in one homestead; that on one Saturday afternoon Amanullah fell out with his wife Budhu, because she would not pick a particular *sâg* (vegetable) for supper, and though she prepared a good supper for him afterwards, yet, nevertheless, he turned sulky, and would eat none of it; and that, in the middle of the night, towards morning, he cut the throat, both of his wife and of the little child, and buried their bodies in one grave before daylight. The bodies were never found, although an empty grave was pointed out as that in which they were placed; and a skeleton was discovered in a neighbouring jungle under circumstances which I shall presently mention.

The prisoner's defence to this case was: "I did not kill Budhu and Koreemun. They "died of cholera. Koreemun got cholera on "the afternoon of Saturday, the 24th Kartick, "and Budhu got it shortly before the sun set. "Koreemun died after midnight, and Budhu "died one prohur afterwards. I am myself a "practitioner, and gave them medicine. I tied "their leg and hand-joints with a cloth, and "gave medicine externally also. I also applied "medicine to their heads, but to no effect. "When they died, I called my villagers and "Dianutullah, Madar Buksh, Bholeh, Dhoria, "Mahrad, Anriah, and others; altogether fifty "or sixty men came and buried the bodies "during the night. Both the bodies were "buried together in the same grave, for the "child was only twenty-one months old. Six "days afterwards, dogs and jackals dug out "the bodies, and ate them; the same day the "head-constable examined the grave. I have "witnesses to prove that the deceased died of "cholera." * * *

The evidence which the prosecution brought to support the charge in the Sessions Court was first * * * * * * * * * * *

[*Phear, J.*, here entered into a consideration of the evidence of each witness before the Sessions Judge, and then proceeded as follows:—]

Now, it is remarkable that all these witnesses, not even excepting the chowkeedar, told different stories altogether before the Sessions Court from those which they told before the Deputy Magistrate—different in material points. Asherun, Upas, and Duri, had their depositions read to them, and denied the truth of the statements which they made before the Deputy Magistrate. It is quite clear, then, that these witnesses are in themselves untrustworthy. Their testimony before the Sessions Court could not be relied upon, nor did it make out the case which the prosecution came into Court to establish. There was one other witness besides those that I have spoken of, namely, the Superintendent of Police, who searched Amanullah's house some fifteen or sixteen days after the occurrence, and spoke to traces of blood in various places. I shall have occasion to remark more particularly upon his evidence presently. It is enough for the present moment to say that, even taking it at the utmost which it can be worth, we think this man's testimony does not supply the defects apparent in the testimony of the other witnesses.

The Sessions Judge perceived that the case for the prosecution was not made out by the testimony given before the Sessions Court, and he expressed his opinion that the principal witnesses had there perjured themselves. Indeed two, if not three, of them he directed to be sent before the Magistrate upon a charge of giving false evidence. Nevertheless, he convicted the prisoner of murder, and sentenced him to be hanged. This is certainly a somewhat startling result, and he arrived at it in the following way.

After making some analysis of the testimony of the witnesses before him, and contrasting it with the depositions which they had made before the Deputy Magistrate, he says: "From the above abstract of the evi- "dence of the witnesses as given before the "Committing Officer and before this Court, it "is evident that the two sets of evidence are "contradictory and inconsistent with each "other. The question now is, whether the "whole evidence ought to be discarded as "untrustworthy on the ground of those con- "tradictions and inconsistencies, or whether "a portion of it should be relied upon and "made the basis of my judgment in the "case. Now, as regards the evidence given "by the witnesses before the Committing "Officer, it must be observed that, at the time "when they were examined by that officer, "they were apparently free from all external "influence, and would have deposed to "nothing but what they had witnessed; while, "on the other hand, when they gave their evi- "dence before this Court, those interested in "bringing about the prisoner's acquittal had "had ample opportunity of tampering with "the witnesses, and the witnesses themselves "had also sufficient time to think over the "consequence of their evidence. I have, "therefore, very carefully considered both "these sets of evidence, and have duly "weighed the circumstances under which

"each was given, as also the arguments "urged against its credibility by the pri- "soner's Counsel, and the conclusion at "which I arrive is, that the testimony of the "witnesses, as given before the Committing "Officer, is to be believed, and I do accord- "ingly believe it; and acting under the pro- "visions of Section 249, Criminal Procedure "Code, I ground my judgment thereon."

In other words, the Judge founds his conviction of the prisoner on the charge of murder upon the testimony which was given before another judicial officer, not before himself, by the very persons who, according to his own view before him, showed themselves in the very same matter to be utterly unworthy of belief. Even if Section 249 warranted the Court in taking such a step as this, it seems to me certainly an inordinately long step to take. And I might almost say that the logical consequence would be that the taking of evidence in the Sessions Court might be altogether dispensed with; for, if it is legitimate, proper, and safe that the Sessions Court should come to a verdict against the prisoner upon the evidence given before the Magistrate by witnesses who, before the Sessions Court, denied that evidence, and showed themselves unworthy of belief, *à fortiori* it would be right, proper, and safe for the Sessions Court to found its judgment upon the evidence given before the Magistrate in those cases where the witnesses afterwards confirm that evidence by the testimony which they give in the Sessions Court. And I think that this very obvious consequence shows very conclusively that the Judge misapprehended the true scope of Section 249 of the Criminal Procedure Code. That Section runs in these words:—

"When a witness is produced before the "Court of Session or High Court the evi- "dence given by him before the Committing "Magistrate may be referred to by the Court, "if it was duly taken in the presence of the "accused person, and the Court may, if it "think fit, ground its judgment thereon, "although the witnesses may, at the trial, "make statements inconsistent therewith."

It appears to me that the Legislature, in framing this enactment, desired merely to authorize the Court to take a particular statement made by a witness before the Committing Magistrate as the true statement, notwithstanding that it was denied, or a statement inconsistent therewith was made by the witness before the Court itself, if the Court could see from the evidence of that same witness before itself, or of other witnesses before itself, that the original statement was worthy of belief—not that the Court shoud discard wholly the testimony of witnesses given before it, and have recourse to the testimony of the same persons which was given elsewhere before another judicial officer on the occasion of making the investigation preliminary to the final trial. The discretion which is conferred by the passage "if the Court thinks fit" in Section 249 is to be exercised upon substantial materials rightly before the Court, and reasonably sufficient to guide the judgment of the Court to the truth of the matter, and not, as was the case here, upon mere speculation or conjecture.

And I venture also to think that the Judge, in the passage which I have just now read, was not quite so careful as he ought to have been in regard to the comparison which he made as to the circumstances which surrounded the witnesses in the Court of the Deputy Magistrate and in the Sessions Court respectively. He says: "When they were "examined by the Committing Officer, they "were apparently free from all external "influence, and would have deposed to "nothing but what they had witnessed."

But he gives no reason for this assumption; whereas there was a considerable body of evidence on the record going to show, whatever it might be worth, that the witnesses were not free, but, on the contrary, were under compulsion and restraint when they gave their evidence before the Deputy Magistrate. It is, we know, a very common story on the part of witnesses, who vary their evidence between the time when they give their testimony before the Committing Officer and the time when they give their testimony before the Sessions Court, to say that they were originally forced to give the testimony which they did give before the Committing Officer by the coercion of the police; and very often, no doubt, this story is entirely fictitious. But, again, we know too well that, in many other cases, there is a real foundation for it, and the Judge ought not to have assumed, in the face of the actual statements of the witnesses themselves, that they were free from restraint and from all external influence when they gave their testimony before the Committing Officer, without dealing with those statements themselves, and saying what, in his opinion, they were worth on the evidence before him. And when he goes on to say that, "while, on the other hand, when "they gave their evidence before this Court,

"those interested in bringing about the "prisoner's acquittal had had ample oppor- "tunity of tampering with the witnesses, "and the witnesses themselves had also "sufficient time to think over the consequence "of their evidence," he seems to be making an equally strong assumption against the prisoner and these witnesses without any foundation at all, unless he depends for that foundation upon the evidence of the Assistant Superintendent given before the Sessions Court, to which I will now for a moment advert.

I have already stated that this witness searched and examined the prisoner's house some fortnight or more after the occurrence took place. He was not the first police-officer who made an investigation of the case; and he was unable from his own observation to testify to any material fact except to such traces of the violent deed as he might succeed in discovering upon his search and examination of the house. But he was, nevertheless, allowed in the Sessions Court to give evidence at very great length—evidence of the most serious character as affecting the prisoner—most prejudicial to the fairness of the trial—evidence, I will add, that was markedly distinguished by disregard, on the part of the examiner, of the principal rules of evidence which the Evidence Act has made part of the law of this country.

He says: "I arrived on the spot on "the morning of the 21st November last. "On getting near the village, I met the head- "constable, who was on his way back to his "outpost" (this was the man who was investigating the case in the first instance). "I enquired the result of the investigation "from him; he said that deaths had been the "result of cholera, and that there was "nothing suspicious in the case. I gave "him leave to return to his outpost, and "went into the village myself. I inspected "the grave in which the bodies were said to "have been buried; it appeared to me "clumsily constructed, and too short to "contain the body of an ordinary-sized "woman."

Now, this assertion is a mere matter of opinion; and if the fact was of any importance in the case, as the judge thought it was, because in his judgment he refers to this statement, and attaches weight to it, the witness's mere opinion ought not to have been accepted. He ought to have been made to state what the length of it was, if he had measured the length of it; and if he had not measured the length, and could not speak with any certainty as to the length and size of it, he should not have been allowed to say anything upon the point at all; the Court certainly ought not to have taken such an opinion as this. In the next passage, the witness is allowed to say:—

"I learnt also that the bodies had been "exhumed by the defendant, and thrown "into the jungle, in order to prevent their "being found by the police."

I feel compelled to ask—Can anything be more prejudicial to the fairness of the trial than to start it with evidence of this kind? And I need not say that such evidence is forbidden by the Evidence Act to be received.

Next, the witness is permitted to say that he saw marks of blood on the floor; that he brought in the door in which there were several marks of blood visible, and also some clothes in which there were marks of blood.

But none of these marks have been submitted to analysis; and the statement of a police-officer as to marks being marks of blood is but an opinion worth exceedingly little of itself, and worth still less when it is made with regard to marks seen for the first time at least a fortnight after the occurrence took place. It is plain that testimony such as this should not have been received in this form.

[The Court proceeded to comment further on the evidence of this witness, and then said:—]

Now, if we go back to the testimony which these witnesses together gave before the Deputy Magistrate, and upon which the Court had placed its judgment, it seems to me that that evidence is itself of the most untrustworthy character. It bears throughout the appearance of having been prepared, of being in truth drilled testimony. It has this peculiar feature which very commonly accompanies a prepared case, namely, that every witness knows everything material about the case and is able to speak himself directly to every material fact from the beginning to the end. Those who are interested in making a strong case for the prosecution seldom trust to the Court's ability to put detached evidence together into a consistent whole, but generally exhibit a considerable anxiety to make out an entire story by the mouth of each of the witnesses. And that peculiarity certainly is exhibited in this case. But, more than this, the first witness, being a chowkeedar, to whose evidence before the Sessions Court I

have already made reference, clearly perjured himself before the Deputy Magistrate.

[The Court then proceeded to consider, at length, the evidence which was given before the Deputy Magistrate, and then concluded as follows :—]

And, on the whole, it seems to me that, if I looked at the testimony alone of the witnesses given before the Deputy Magistrate, I should have just as much difficulty in arriving at the conclusion that Amanullah had murdered his wife and his daughter, as alleged by the prosecution, as I have, in doing so upon the testimony of the witnesses, given before the Sessions Court. I cannot resist the impression that the stories which were given before the Deputy Magistrate were substantially police-made stories, and that it was endeavoured by the prosecution to bolster these up, and to give them color by the testimony of the constable himself, which was most fictitious in its material parts. I think, therefore, that the prisoner ought not to have been convicted, and that the sentence of the Sessions Court should be set aside, and the prisoner discharged.

Morris, J.—I quite agree in the view of the evidence taken by my learned brother in this case. I also think that it was not safe to convict the accused Amanullah solely on the evidence given by the witnesses before the Magistrate—witnesses who, the Judge considered, had perjured before him. It seems to me that, under Section 249 of the Criminal Procedure Code, a Judge may base his judgment on the evidence given before the Magistrate in the presence of the accused, when there are special and particular reasons for considering that evidence to be honest and true, and when that evidence is to a certain extent corroborated by independent testimony before himself. In the present instance there is nothing of this kind. There is really no one such substantive fact conclusively proved as can enable the Judge to say with confidence that the evidence given before the Magistrate was true as opposed to what was said before himself. Nor can it be said that the police-officer, or any other witness before the Court of Session, affords independent testimony corroborative of the evidence given before the Magistrate. It is most unfortunate that so much valuable time was lost in the prosecution of this case. The police-officer who made the first enquiry considered that the mother and child had died of cholera, and that the case was not one of murder. And certainly on the evidence as it now comes before us, I think it impossible to say that there is any certainty in regard to the mother and child having been murdered by the prisoner. I, therefore, concur in ordering the discharge of the prisoner.

The 24th March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris,
Judges.

Evidence—Statements by accused persons—Act I. of 1872, Section 30.

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Chota Nagpore, on a charge of committing riot armed with deadly weapons.

The Queen

versus

Bunwaree Lall and others,
Appellants.

Moonshee Abdul Baree for the Appellants.

Statements made by one set of prisoners criminating another set of prisoners, when each individual prisoner made a case for himself on which he was free from any criminal offence, ought not to be taken into consideration, under Section 30 of the Evidence Act, against the prisoners of the second set, when the two sets, although tried together, were tried upon totally different charges.

Phear, J.—We think that, in this case, as in the case of the prisoners Khukree and others,* which was lately before us, the conviction must be set aside. In that case, we dealt with the evidence which was on this record, and it appeared to us that, on the showing of the Judicial Commissioner himself, the testimony of the witnesses who were brought to support the case of the prosecution was worthless, and although the statements made by the prisoners of the one party incriminated the prisoners of the other party, yet each individual prisoner made a case for himself on which he was free from any criminal offence, and inasmuch as the two sets of prisoners, although they were tried together, were tried upon totally different charges respectively, the statements which were made by the one set could not be taken into consideration, under Section 30 of the Evidence Act, against the prisoners of the other set.

Ante, p. 48.

It thus appears that there is no evidence on the record which is sufficient to support a conviction, and we, therefore, set aside the conviction, and direct that the prisoners be enlarged so far as the present charges are concerned.

The 24th March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Magistrate—Jury—Procedure—Act X. of 1872, Section 523.

(Miscellaneous Case.)

Sheikh Nozumuddy, *Petitioner,*

versus

Hasim Khan, *Opposite Party.*

Baboo Doorga Mohun Dass for the Petitioner.

Baboo Gopal Lall Mitter for the Opposite Party.

Where a Jury, appointed by a Magistrate under Section 523, Code of Criminal Procedure, had fully entertained and considered the matter submitted to it, and the individual members of the Jury had given in their opinion to the foreman to report to the Magistrate, and the only delay was in the foreman's making the report, it was held that the Magistrate could not appoint a second Jury to consider the matter afresh, but ought to have acted on the report of the first Jury, which had been given in before he made his final order in the matter.

Phear, J.—We are of opinion that this rule must be made absolute. It seems to us that the Magistrate acted *ultra vires* when, on the 1st of October, he re-constituted the Jury, which he had previously appointed under Section 523, Criminal Procedure Code, and that the opinion or report of the first Jury, which was given in by the first appointed foreman before the Magistrate's final order was made on the 8th October, was the report on which he was bound in law to found his order.

The first Jury was not only duly appointed, but entertained the matter which was referred to it, and had entirely discharged its duties before the 1st of October, with this exception, namely, that the foreman had, for some reason or other, delayed to send in the report which the Jury was bound to make. This being so, no doubt, the Magistrate had power, under Section 523, to pass an order, of his own discretion, before the report of the Jury actually came in; provided, as did happen here, that the delay in the sending in of the report exceeded a reasonable time, namely, the time prescribed for the purpose. But he had not power, merely because the first Jury failed to send in their report, to appoint a second Jury, and to commit the matter afresh to the second Jury.

We do not intend to say that, in the event of a Jury, duly appointed under Section 523, for some good cause, being unable to entertain and determine the matter submitted to it, it is not competent to the Magistrate to appoint a fresh Jury. Suppose, for instance, that, before the Jury had discharged its duties, one of its members died; or suppose the Jury became perverse, and refused to entertain the matter for which it was appointed: in such cases it may well be that the first order of appointment ought to be considered as having fallen through and become useless, and the Magistrate would then have power, under Section 523, to appoint a fresh Jury.

But this is not the case here, because it appears that the first Jury fully entertained and considered the matter submitted to it, and the individual members of it had given in their opinion to the foreman to report to the Magistrate, even before the second Jury was constructed.

The failure was that the foreman omitted for a time to make his formal report to the Magistrate. But that report did eventually reach the Magistrate through the foreman of the second Jury before he made the order which is now complained of.

It appears to us, under these circumstances, that that was the report by which he was bound to guide himself; and, further, that the report of the second Jury was, so far as regards the objects of Section 523, in itself a nullity.

The rule is made absolute, the order complained of is quashed, and the Magistrate is directed to make an order founded on the report of the first Jury.

The 24th March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Breach of the peace—Possession—Act X. of 1872, Section 530.

(Miscellaneous Case.)

Mudhoosoodun Shaha and another, *Petitioners.*

versus

Bejoy Gobind Chowdhry and others, *Opposite Party.*

The Advocate-General and *Baboo Shoshee Bhoosun Dutt* for the Petitioners.

Baboo Sreenath Dass for the Opposite Party.

In a case of dispute regarding land of a considerable area, in which both parties contended that they held possession of the area through the means of ryots, it was held that the Magistrate, instead of making an order, under Section 530 of the Code of Criminal Procedure, that the land should remain in the possession of one of the parties until the decision of a competent Civil Court, should have proceeded to consider the question which party was in possession of the constituent portions of the land, piece by piece, by the hands of his ryots.

Phear, J.—We think that the Magistrate's order in this case must be quashed. The order is to the effect that, until the decision of a competent Court be obtained, possession of the disputed chur is to remain with Bejoy Gobind Chowdhry, and this order has been made in exercise of the powers conferred on the Magistrate by Section 530, Criminal Procedure Code. That Section says: "Whenever the Magistrate of the District, "or a Magistrate of a division of a district, "or a Magistrate of the first class, is satisfied "that a dispute likely to induce a breach of "the peace exists concerning any land or "the boundaries of any land, or concerning "any houses, water, fisheries, crops, or other "produce of land, within the limits of his "jurisdiction, such Magistrate shall record a "proceeding, stating the grounds of his being "so satisfied, and shall call on the parties "concerned in such dispute to attend his "Court in person or by agent within a time "to be fixed by such Magistrate, and to give "in a written statement of their respective "claims as respects the fact of actual "possession of the subject of dispute. Such "Magistrate shall, without reference to the "merits or claims of any party to a right of "possession, proceed to inquire and decide "which party is in possession of the subject "of dispute."

In the present case, the subject of dispute is a very considerable area of land, and the contention of both parties is that they hold possession of this area through means of ryots, cultivators. If this be so, the question which the Magistrate has to solve with regard to possession is not the simple question of who is in possession of the whole mehal, but who is in possession of the constituent portions of the land, piece by piece, by the hands of his ryots. It is manifest, as it seems to us, that the petitioner in this case has given the best possible evidence of possession of a large number of portions of this land by means of ryots, because he has, as we are told, filed a very large number of kubooleuts, and has given proofs of their authenticity. His gomastah or some zemindaree amlah has spoken, as we are informed, to the authenticity of these kubooleuts. If this be so, it is direct evidence, so far as it goes, of possession of so much of the land as is covered by the kubooleuts.

On the other hand, the respondent, in whose favor the order has been made, has given evidence of direct possession of a limited portion only of the chur. He has produced a certain small number of ryots who, of course, can speak immediately to possession of the plots of land which they respectively occupy and cultivate. If the result of this evidence is that the Court believes these witnesses, it would be right in making an order supporting the possession of the respondent in those plots of land which his ryots cultivate, but the order ought not to extend to land with respect to which the witnesses do not speak to immediate possession by the hands of the cultivators.

We think, on the whole, it is very plain that the Magistrate's order, in its entirety, cannot be supported on the evidence, and must be quashed as being without legal foundation. This will leave it open to the Magistrate to make a proper order on the evidence such as it is.

The 25th March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Absent witness—Evidence—Adjournment—Act I. of 1872, Section 33.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of murder.

The Queen

versus

Lukhun Santhal, *Appellant.*

Before a Sessions Judge can, under Section 33, Act I. of 1872, admit the depositions of witnesses given in a former judicial proceeding as evidence before him, instead of, and in place of, the oral depositions of the witnesses themselves, it ought to appear that the presence of the witnesses could not be obtained without an amount of delay or expense which the Court considers unreasonable; and if there is nothing of a special nature to stand in the way, the case should be adjourned to the next Sessions to procure the attendance of the witnesses.

Phear, J.—In this case, Mr. Stewart, the Deputy Magistrate, before whom the complaint was first made, was of opinion that no ground of commitment had been made out, and accordingly he discharged the prisoner. But the Deputy Commissioner, upon the matter being represented to him, directed Mr. Stewart to commit the case for trial before the Sessions Judge of Bhaugulpore.

Upon receiving this direction, the Deputy Magistrate recorded the following order:—

"As directed by the Deputy Commissioner, "I order the accused to be committed to take "his trial before the Sessions Judge of "Bhaugulpore."

In pursuance of this commitment, the prisoner appeared before the Sessions Court of Bhaugulpore, and the Sessions Judge recorded this memorandum:—

"The Lower Court having, apparently, "neglected to frame a charge, this Court "directs that the following charge be made "against the prisoner Lukhun Santhal—that "he, on or about the 16th October 1873, at "Bangoorah, committed murder by volun-"tarily causing the death of Deeboo San-"thal."

And upon this charge so framed by the Judge, the prisoner was put to his trial. He pleaded not guilty. And the assessors expressed the opinion that the death of Deeboo Santhal was the result of an accident, and therefore that the prisoner ought to be acquitted. But the Sessions Judge held that the prisoner was guilty of murder, and sentenced him to transportation for life.

On the record of the Sessions Court as it has come up to us, we do not find the evidence of witnesses, excepting in the shape of depositions which purport to have been made before the Assistant Commissioner: and we have the following remark of the Judge:—

"The officer of the Court reports that "neither of the witnesses for the prosecution "are present. The accused in his exami-"nation admits the facts which have been "spoken to by the witnesses in the prelimi-"nary enquiry. As, therefore, useless delay "and expense would be incurred by postpon-"ing this case, and causing the absent wit-"nesses to appear, it is hereby ordered that "the depositions taken by the Assistant "Commissioner be, under Section 33, Act I. "of 1872, admitted as evidence in the present "case."

The Section 33, Act I. of 1872, runs thus:—

"Evidence given by a witness in a judicial "proceeding, or before any person author-"ized by law to take it, is relevant for the "purpose of proving in a subsequent judicial "proceeding, or in a later stage of the same "judicial proceeding, the truth of the facts "which it states, when the witness is dead, "or cannot be found, or is incapable of "giving evidence, or is kept out of the way "by the adverse party, or if his presence "cannot be obtained without an amount of "delay or expense which, under the circum-"stances of the case, the Court considers "unreasonable."

The Judge must have considered that the present case fell under the last predicate. But he does not go so far as to say that he thinks that the presence of the witnesses could not be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable. He confines himself to saying: "As, therefore, useless delay and expense "would be incurred by postponing this case, "and causing the absent witnesses to appear, "it is hereby ordered ***." Now, it might very well be that, in the view which the Judge had taken of the case, "the delay and expense" of postponing the trial, in order that the absent witnesses might be able to appear, was a "useless delay and expense." But it does not follow that the delay and expense of bringing the witnesses was, under all the circumstances of the case, unreasonable. The delay could hardly, in a matter of

this kind, where the charge against the prisoner was that of having committed murder—the delay of an adjournment to the next Sessions—could not in itself very well be considered unreasonable for the purpose of enabling the case to be duly tried on *vivâ voce* testimony, and the expense of bringing the witnesses of the prosecution, and any other expense that might be attendant upon this delay, could hardly of itself, under the circumstances disclosed to us, be considered unreasonable, unless it is so in almost every case which is tried. The prisoner certainly had a right to expect that the witnesses should be brought to give their testimony *vivâ voce* before the Sessions Court, and any expense or delay that might be necessary for that purpose must, in the absence of special facts, be taken as reasonable rather than unreasonable. This is not a case in which any special difficulty seems to bave occurred in the way of procuring the witnesses, for nothing of a special nature is hinted at by the Judge which should stand in the way of postponement of the trial. And, this being so, we think that the condition was not satisfied under which, in pursuance of the provisions of Section 33, the Judge had discretion to take the depositions of witnesses, instead of, and in the place of, the oral testimony of the witnesses themselves.

The result is, in our opinion, that there was no evidence rightly before the Court at the Sessions trial, except the statement which the prisoner himself made to the Court. And, upon a consideration of that statement, we think that it falls short of constituting a sufficient foundation for conviction on the charge of murder. The prisoner, no doubt, admits that, being angered with the woman, he took a billet of wood of a certain considerable size, and threw it at her. The consequence of this act appears to have been that the man, and not the woman, was struck on the head, and his skull was fractured. Now, although, as a rule, a person must be taken to intend the immediate consequence of his act, still, in a case such as this, we think it almost certain that the prisoner never intended to fracture the skull, either of the man or the woman, or, indeed, had the slightest thought of doing either of them anything more than hurt. In this view, we are of opinion that the prisoner was wrongly convicted of murder, and that that conviction must be, therefore, set aside. And under all the circumstances of the case, and in view also of the opinion which was expressed by the assessors, we think that it is unnecessary to consider whether the prisoner could, upon his own statement, be convicted of any minor offence. The conviction is, therefore, set aside, and the prisoner is acquitted; and he must, therefore, be discharged, so far as this charge is concerned.

The 28th March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

High Court—Bench of Magistrates.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Backergunge.

Abdool Huq Chowdhry, *Petitioner,*

versus

Idrak, *Opposite Party.*

Where a Bench of Magistrates have before it materials which are sufficient in law to support a conviction, the High Court has no authority to disturb it.

Reference.—A PLOT of paddy-land in the village of Hurinaphulia in Station Kotwalee has for some time been the subject of contention between two rival parties, one asserting its right to a moiety of the plot, and the other claiming the whole of the land by right of purchase.

The petitioner, Abdool Huq, belongs to the former, and Idrak is a ryot of the latter party. It is alleged on the side of Idrak that he had sown the land with paddy, and that the petitioner and others cut and removed the crop forcibly. But the version of the petitioner is that the paddy was his, and that Idrak had nothing whatever to do with either the land or its produce.

The first Bench of Magistrates of Burrisaul, trying the case summarily, considered that Idrak was the cultivator of the land, and that Abdool Huq and his party had cut and taken away the paddy that grew on it, and, finding the petitioner guilty of theft under Section 379, Indian Penal Code, sentenced him to three months' rigorous imprisonment.

For the reasons stated in my order dated 13th instant, forwarded with the record, I am of opinion that the conviction is bad, and that the order of the Bench, which is not appealable, should be set aside.

The reasons stated by the Sessions Judge. —The petitioner has been convicted on a summary trial of the offence of theft, and has been sentenced by a Bench to imprisonment for three months. He complains that the conviction is illegal.

It appeared, on the first perusal of the Lower Court's proceedings, that there was nothing to show that the value of the property alleged to have been stolen was not more than Rs. 50, and this Court doubted whether the circumstances set forth warranted a charge of theft at all. It called for an explanation from the Lower Court. It has been satisfactorily shown that the value of the property alleged to have been stolen was not more than Rs. 50. If the case, therefore, was one of theft, there was no objection to its being tried summarily.

But I still think that the case should never have been tried as one of theft, and that, if any criminal offence was committed at all, it was one under Section 206 of the Penal Code, which, however, is not triable summarily. It is admitted that the prisoner was one of two parties claiming the land on which the paddy in question was growing, and the Lower Court admits that the prisoner may have thought himself justified in cutting the crops. It is still a mooted question to whom the land really belongs. The Lower Court has been misled by a wrong view of a Civil Court decree, in execution of which the crop in question had been ordered to be attached, when the prisoner anticipated the process of the Court by cutting the paddy, and removing it. The decree was not against himself, but was against the complainant in this case, at the suit of one of the rival claimants to this piece of land. The Lower Court has evidently taken the decree, which was not exhibited, as one determining the right in the land, whereas it was really, as admitted by pleaders on both sides, a mere decree for rent, in execution of which the decree-holder had applied for the attachment of the crops in question. The order for attachment, therefore, is no evidence whatever that the crops belonged to the complainant rather than to the prisoner. It has been frequently ruled by the High Court that, in cases of *bond-fide* disputed right to crops, the cutting of them by one of the disputants ought not to be made the subject of a prosecution for theft.

I am of opinion, therefore, that the conviction is bad, but, the order not being appealable, I refer the case under Section 296, Code of Criminal Procedure, for the orders of the High Court. In the meantime, the petitioner will remain on bail.

Judgment of the High Court.

Phear, J.—The Judge has sent this case up to this Court as the case of a conviction come to on a summary trial, and has recommended that it be quashed for reasons which he gives in his letter of reference.

We must remark at the outset that the case comes to us in a very awkward form; and it is somewhat difficult to understand how it has happened that, if the trial was held summarily, there is so voluminous a record as that which has been sent to us. If the terms of the Act had been complied with, we ought to have had in the stead of a record merely a copy of the register. However, we find in the papers a somewhat lengthy judgment signed by the Chairman of the Bench; and, in the absence of the register or copy of register, we assume that this represents the reasons upon which the conviction was come to.

The offence of which the accused persons have been convicted is the offence of theft—theft of paddy; and we find from this judgment that the Bench was of opinion, upon the evidence before it, that this paddy was the property of the complainant; that it was taken away from him without his consent or authority by the prisoners; and that this was done dishonestly. And from the references which are made in this judgment to the evidence upon which these conclusions are based, it appears to us that there was ample evidence before the Bench to support them. The judgment states: "For the prosecution, "we have examined the witnesses named in "the margin, all of whom, except the peon, "live and have land near the field in ques- "tion. They all agree in stating that the "field in dispute is in the possession of the "complainant, who ploughed and sowed it. "With regard to the cutting of the paddy, "there could be no dispute, and so the "accused parties admit that they cut it, but "they add that it belonged to them, and they "had sown it."

In another passage of the judgment, the Chairman says: "But the *mala fides* on "the part of the defendants is seen by the "fact, satisfactorily proved before us, but "denied by them, that the paddy was cut in "the *night*, and that it was not yet fully "ripe."

It appears, then, that the Bench had before it materials which were sufficient, if trusted and accepted, to support the conviction at which it arrived. It is true that, in the

other parts of the judgment, considerable weight seems to have been attached by the Bench to the existence and effect of a certain Moonsiff's decree; and it is possible, as the Judge appears to think was the case, that this decree was misapprehended by the Bench. But on this point we are unable to form any judgment, because the decree is not before us, nor is it our function, sitting here on review of a case disposed of summarily by a Magistrate, to enquire into the details of the evidence, and to determine upon its value. If it appears, as it does in this case, that there was evidence before the convicting Bench, which was sufficient in law to support the conviction, this Court has no authority to disturb it.

For these reasons, we decline to interfere.

The 30th March 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, J. B. Phear, E. G. Birch, and G. G. Morris, *Judges.*

Partner—Criminal misappropriation—Act XLV. of 1860, Section 405.

(Criminal Motion.)

Nrigendro Lall Chatterjee, *Petitioner*,

versus

Okhoy Coomar Shaw and others, *Opposite Party*.

A partner, who dishonestly misappropriates or converts to his own use, or dishonestly uses or disposes of, any of the partnership-property which he is entrusted with, or has dominion over, is guilty of criminal misappropriation under Section 405 of the Penal Code.

This matter was referred to the Full Bench by Couch, C.J., and Ainslie, J., with the following remarks:—

THE applicant, on the 26th of January 1874, made a deposition upon solemn affirmation before A. L. Playfair, Cantonment Magistrate of Dinapore, as follows:—

"In the month of April last, the defendant, Okhoy Coomar Shaw, came to me in Calcutta, and applied to me to begin a business at Ghazeeabad, and afterwards, with my sanction, he opened a shop at Dinapore Railway Station. I forwarded accordingly, for this purpose, Rs. 2,050 worth of wine and stores to Khagoul, besides which I paid into my partner's hand a cheque for Rs. 700 for the purpose of buying stores and stamps.

"The shop was opened on 7th July, and continued so until 30th September 1873.

"I received no intimation from my partner as to the shop being closed. In October, I proceeded to Khagoul, and found the goods all removed, and defendants Okhoy, Hurry Dass, and Bibun, were present.

"I asked the first defendant where the things were, and he replied that he had sold the things to one Benod Beharee Shaw in Calcutta. I then asked for the money, and he said it would be paid in Calcutta. He accompanied me as far as Mokameh, from which place he absconded.

"I went thence to Calcutta alone, and my attorney asked Benod Beharee Shaw whether he had purchased anything from Okhoy, but he replied, nothing.

"I remained for about one month in Calcutta, and afterwards, finding that the defendant did not appear, I came to Dinapore, and charged my partner with criminal breach of trust or criminal misappropriation.

"The defendant is my partner, as the deed of partnership (marked B) shows. The defendant's share is half after the payment of the amount I advanced. The property which was in defendant's possession belonged to the firm named 'The Victoria Hotel, O. C. Shaw & Co.' (Okhoy Coomar Shaw & Co.). The defendant was the partner who managed at Dinapore Railway Station. I admit the authenticity of the deed marked B. It is distinctly written in this document that defendant has paid Rs. 500-8, and bears my signature. Our firm is a wholesale firm as well as retail. If my wines had been kept for a long time, and any loss had occurred, I should have prosecuted defendant civilly. It is written in a deed of assignment that, if there be any loss on account of the mismanagement of defendant, the amount will be realized by sale of the defendant's property (*viz.*, his private property).

"*Question.*—How many boxes of things have you attached?

"*Answer.*—I went to Futtehpore personally, and attached the things, the value of which is something under Rs. 3,000.

"*Question.*—Is it written in Exhibit B that, if any partner advances any sum above his share, he will get Re. 1-4 per cent. above his share?

"*Answer.*—Yes.

"*Question.*—Have you taken any security from your partner?

"*Answer.*— I have.

"(Sd.) A. L. PLAYFAIR,
"*Cantonment Magistrate.*"

"*Dated 26th January 1874.*"

Thereupon the Magistrate gave the following judgment:—

"This is a complaint preferred by one Nrigendro Lall Chatterjee against his partner in the firm of 'The Victoria Hotel, O. C. Shaw & Co.,' for the offence of criminal misappropriation in respect to the property of which, according to the 'deed of partnership,' they would appear to be joint-owners.

"As no witnesses in the case have yet been summoned, the complainant's is the only deposition which I have been able to record.

"The accused states that the goods in question were sold by him to his brother, Bibun Beharee Shaw, on account of the hotel-license having been withdrawn by the Superintendent of Abkaree; and the goods being all of a perishable nature, he considers, acting as a partner, that he was quite justified in doing what he did. He does not appear to have submitted an account of the sale to his partner as yet, but this he states he is willing and ready to do.

"There can be no doubt whatever with regard to the fact of the accused being a partner in the firm, as this statement is fully confirmed by the prosecutor himself as well as by the deed of partnership, and, according to the prosecutor's own statement, the whole of the property which was in the possession of the accused belonged to the firm of Okhoy Coomar Shaw & Co., of which firm the accused was the managing partner at the Dinapore Railway Station.

"The authenticity of the registered deed of partnership is admitted by the complainant, and it is most distinctly stated in the said deed, which bears the complainant's signature, that the accused had advanced, for the purpose of commencing the business, the sum of Rs. 500-8.

"The prosecutor likewise admits that he has taken security from his partner for the purpose of indemnifying himself against any loss which might be occasioned in consequence of the defendant's mismanagement, and it is very clearly mentioned in a deed of assignment that, if any loss occurs through the mismanagement of the partner, the amount will be realized by the sale of his private property.

"As there can be no doubt, therefore, with respect to the parties in this case being partners, it is clear that the gist of the offence, *viz.*, a 'dishonest misappropriation,' is, for that reason, wholly wanting, and consequently the prosecutor's remedy is in a 'civil suit' for an account.

"According to a decision of the Calcutta High Court, one partner cannot charge his co-partner with criminal breach of trust (*vide* Vol. IX., W. R., Criminal Rulings, p. 37).

"Acting upon that decision, I consider I am not justified in proceeding further with this case.

"I accordingly dismiss the complaint under Section 147, Criminal Procedure Code, in combination with the ruling of the Calcutta High Court just referred to.

"The defendants are discharged under Section 215, Criminal Procedure Code.

"(Sd.) A. L. PLAYFAIR,
"*Cantonment Magistrate.*"

"*Dated 26th January 1874.*"

The question thus arises whether, if a partner dishonestly misappropriates or converts to his own use, or dishonestly uses or disposes of, any of the partnership property which he is entrusted with, or has dominion over, he is guilty of an offence punishable under the Penal Code.

As we differ from the decision in 9 W. R., C. R., 37, quoted by the Magistrate, we refer the question for decision by a Full Bench.

The judgment of the Full Bench was delivered as follows by—

Couch, C.J.—In this case, a charge was preferred by the applicant against Okhoy Coomar Shaw and others before the Magistrate of an offence of criminal misappropriation. The Magistrate dismissed the complaint, and discharged the defendants, on the ground that the complainant and the accused were partners, or, as he says in the first part of his judgment, that they were, according to a deed of partnership, joint-owners of the property in respect of which the criminal misappropriation was alleged. He founded his decision upon a case in this Court in the IX. Weekly Reporter, Criminal Rulings, p. 37, in which two of the learned Judges, Mr. Justice Kemp and the late Mr. Justice Mitter, held that, if there was a partnership, there could not be a conviction for criminal breach of trust. Mr. Justice Elphinstone Jackson appears to have doubted this and

not to have concurred with the other two Judges. He took a different view of the case, and also said that he was inclined to think that there might be circumstances under which one partner might be guilty of criminal breach of trust against another.

An application was made to this Court before myself and Mr. Justice Ainslie, under Section 297 of the Criminal Procedure Code, to send for the papers, and to decide upon the validity, in point of law, of the Magistrate's decision.

Seeing that the Magistrate had acted upon a decision of this Court, we felt bound to refer the question for decision by a Full Bench, although, I think, I may say that we neither of us at the time entertained any serious doubt upon it.

It appears that there is a decision of Mr. Justice Markby and Mr. Justice Birch in XXI. Weekly Reporter, Criminal Rulings, p. 10, in which those learned Judges have held that there may be an offence under Section 424 of the Penal Code; there may be a fraudulent concealment or removal of property, whether the fraud is intended to be practised on creditors or partners. This case was not quoted when the application was made to us; but, if it had been, we should still have been under the necessity of referring the question to a Full Bench.

We think the words of Section 405 of the Penal Code are large enough to include the case of a partner, if it be proved that he was, in fact, entrusted with the partnership-property, or with a dominion over it, and has dishonestly misappropriated it, or converted it to his own use. There is no reason that the case of a partner should be excepted from the operation of this Section. Indeed, there is every reason that it should be included in it. It is a question of fact whether there has been an entrusting of the property, or a giving a dominion over it, sufficient to come within what is required. But if it be made out by the evidence that one partner was entrusted by his co-partners with property, or with a dominion over it, and that he had dishonestly misappropriated it, or dishonestly used it in violation of the mode in which his trust was to be discharged, or of the agreement between the parties as to the use he was to make of the property, he ought to be tried for that offence. I, therefore, think we should say that the decision in the IX. Weekly Reporter cannot be supported, and that the Magistrate ought to enquire into the charge, and determine whether, upon the evidence which may be produced before him, there is sufficient ground for putting the accused upon their trial. I do not think that we can make an order of that kind in the Full Bench. The matter will, therefore, stand over until Mr. Justice Ainslie returns.

The 30th March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Procedure—Warrant-case—Complainant—Accused—Act X. of 1872, Section 192.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Gya.

The Queen

versus

Kassy Singh (Reference No. 55).

The Queen

versus

Hulkoree Singh and another (Reference No. 54).

Moonshee Mahomed Yusoof in support of the Reference.

It is not irregular in a warrant-case for a Deputy Magistrate to take the evidence of the complainant and certain witnesses on behalf of the prosecution in the absence of the accused. All that the accused has a right to expect after the charge has been framed is that the complainant and witnesses who had been examined in his presence before the charge was framed should be recalled for the purposes of cross-examination.

It is entirely within the discretion of a Magistrate conducting a trial in a warrant-case to admit evidence on behalf of either side at any stage of the trial, Section 192, Act X. of 1872, applying to such a case; but the Magistrate, in exercising the discretion conferred on him by this Section, ought to have good reason for allowing witnesses on the part of the prosecution to be interposed in the midst of the case of the accused.

Phear, J. (Reference No. 55).—In this case, the Sessions Judge has referred to this Court the conviction of one Kassy Singh, come to by the Deputy Magistrate, with a recommendation that it be quashed on the following ground. The Judge says: "It "appears from the record, and is admitted "on the part of the prosecution before this "Court, that some of those witnesses were "examined before one, out of the two "defendants, appellant had appeared, or had "even been summoned; that another wit- "ness was examined on a day over which "the case had been adjourned by order of "the Court; and that some more witnesses "were examined after the case for the "prosecution had been closed, and the charges "against the defendants drawn. The whole "of these proceedings are illegal. The "Deputy Magistrate appears to think that the "evidence of these witnesses may, if neces- "sary, be left out of consideration, and the "case for the prosecution allowed to rest on "the evidence of those against the mode of "whose examination no such objection can "be taken. I differ from him; I think that "the whole proceedings in a criminal case "ought to be regularly and legally conducted "from the beginning to the end, and that any "irregularity in any portion of them, by "which it can be shown that the defendants "have been materially prejudiced, is sufficient "to vitiate all the rest. In this case, the "irregularities were those of taking the "evidence of witnesses for the prosecution "in the absence of the defendants, and of "admitting further evidence against them "after the case for the prosecution had been "closed. As to the first, there can be no "manner of doubt that it is one which does "most materially prejudice the defendants, "and the second is also well calculated to "have the same result. I think them suffi- "cient to vitiate all the proceedings, and, "therefore, set aside the conviction."

Although the proceedings before the Deputy Magistrate, as disclosed by the record, which has come up to us, were exceedingly protracted, I may even say dilatory, and were in some respects calculated to cause vexation to the parties accused, yet we are unable, on the whole, to say that there has been such an irregularity or illegality in any portion of the proceedings resulting in material prejudice to the accused as to afford sufficient ground for quashing the order of the Deputy Magistrate.

The case was treated by the Deputy Magistrate as a warrant-case. The accused Kassy Singh, on whose behalf the present reference to this Court has been made, was one of the persons against whom a complaint was made to the Deputy Magistrate on the 28th August 1873. And, on the following day, a warrant was issued for his arrest. This warrant was not executed, because, on the 6th September, Kassy Singh himself appeared to answer the complaint without having been arrested. But the procedure, nevertheless, was that which is prescribed by the Criminal Procedure Code for those cases which are commonly termed warrant-cases. The complainant and witnesses on his behalf were examined, and eventually a charge was framed against Kassy Singh and others. The complainant and three of the witnesses, by whose testimony the case for the prosecution was set forth, were examined on a day before the day when Kassy Singh first appeared; and on the 8th September the pleader on behalf of Kassy Singh asked that they might be recalled for cross-examination, and their cross-examination effected before he should be obliged to proceed to the cross-examination of those witnesses who had given their testimony after Kassy Singh had appeared, and in his presence.

It is sufficient for the moment to say that that request was not immediately complied with. The Deputy Magistrate directed Kassy Singh to go on with the cross-examination of the complainant's witnesses who were then before the Court, and the question of recalling the complainant and the three first witnesses might be considered afterwards.

We cannot discover from the record that the accused Kassy Singh, or any one on his behalf, afterwards in any manner pressed for the recalling of the complainant and his three first witnesses. In fact, they were not recalled. And it is to the non-recalling of these witnesses that the Judge appears to allude when he says: "The irregularities were "those of taking the evidence of witnesses "for the prosecution in the absence of the "defendants." Now, under the procedure which is prescribed for warrant-cases, it was no irregularity on the part of the Deputy Magistrate to take the evidence of the complainant and certain witnesses on behalf of the prosecution in the absence of the accused; all that the accused had a right to claim was that, after the charge was framed, and he was called upon to answer it, he might, if he thought fit, require that the witnesses who had been examined in his presence before the charge was framed should be recalled for the purposes of cross-examina-

ion, that is, the complainant, if he had been o examined, and those witnesses upon whom lone the charge could be based.

Explanation I. of Section 215 of the Criminal Procedure Code expressly enacts hat the absence of the complainant shall ot be deemed sufficient ground for a lischarge of the accused. And Section 218 ays: "If the accused person have any 'defence to make to the charge, he shall be 'called upon to enter upon the same, and to 'produce his witnesses if in attendance, and 'shall be allowed to recall and cross-examine 'the witnesses for the prosecution." If, hen, the case had proceeded regularly, he accused Kassy Singh would, no doubt, ave had a right, when he was called pon to answer the charge framed against im, to ask that those witnesses for the prosecution who had been examined in his presence, and upon whose testimony lone the case for the prosecution could be made to rest, should be recalled for the purpose of cross-examination. And if he had made a requisition to the Court of this kind, and that request had been refused, we should have considered that the Court had acted irregularly, in truth illegally, and that the trial of the defendant must necessarily have been prejudiced. But, as already stated, although the pleader who appeared on behalf of Kassy Singh did, on the 8th September, ask that the complainant and the three first so-called witnesses, though they had not been examined after Kassy Singh appeared, should be recalled for cross-examination before he was obliged to cross-examine the other witnesses who had been already examined in his presence, yet, upon this being overruled, he did not, at any subsequent stage of the case, request that the complainant, or any of those three witnesses, should be recalled for the purposes of cross-examination. And, indeed, inasmuch as these persons had not been examined in his presence, and their testimony, therefore, could not be used against him by the prosecution, and as, moreover, he could not insist upon having the complainant present, he had no strict right to ask to examine them, unless he called them as his own witnesses. It seems to us too pretty clear that the request which was made by the vakeel of Kassy Singh on the 8th September was dictated, not by a desire on the part of his client to have such information as could be elicited from the complainant and the three witnesses by cross-examination, but rather as a step for a possible prolongation of the proceedings, or, at any rate, merely as a step, which might be convenient for the purpose of leading up to the cross-examination of the witnesses who had already been called, and who were before the Court ready to be cross-examined. Although the Court, when it overruled the application that these witnesses should be recalled and cross-examined before the last-mentioned witnesses were cross-examined, said that the question as to the recalling of the witnesses who had not been subjected to cross-examination should be considered afterwards, yet the pleader of the accused Kassy Singh does not appear to have thought it worth his while at any subsequent time to ask for their recall. And a good reason may be supposed for his not doing so, for, by cross-examining them upon that which they had said in his client's absence, he would be making it evidence against him, whereas, if he let it alone, the prosecution would be unable to use it. For this reason, we think it is apparent that the recall of the complainant and these witnesses for the purposes of cross-examination was not really desired by the defendant Kassy Singh for any substantial purpose connected with the trial; and the fact that they were not recalled did not materially prejudice the accused in his defence. Then we have it clear from the Magistrate's judgment that, in his opinion, the evidence before the Court, which was taken after the time when Kassy appeared, exclusive of the testimony which was given by the plaintiff and the three named witnesses in the presence of another accused person, and not in the presence of Kassy, was sufficient to establish the charge made against Kassy.

The second reason given by the Judge for recommending that the conviction should be quashed, namely, that the Deputy Magistrate admitted evidence against the accused after the case for the prosecution had been closed, is, we think, not alone a sufficient ground for invalidating the conviction. It is entirely within the discretion of a Magistrate conducting a trial of this kind to admit evidence on behalf of either side, either the Crown or the accused, at any stage of the trial, when he may think it necessary to do so for the purposes of justice. Section 192 of the Criminal Procedure Code applies to this case; and, according to that Section, "the "Magistrate may, at any stage of the "proceedings, summon and examine any "person whose evidence he considers "essential to the inquiry, and recall and "re-examine any person already examined."

Doubtless, a Magistrate would not be wisely exercising the discretion which this Section confers upon him, if, without good reason, he allowed witnesses on the part of the prosecution to be interposed in the midst of the case of the accused. But we have no good ground shown to us why we should assume that the Magistrate, in this present case, exercised his discretion without good cause. The proceedings, as already remarked, were very greatly protracted; and it is to be regretted that they were allowed to be continued for so long a period as was the case. But we are unable to say that the calling of such witnesses for the prosecution as the Magistrate caused to be called after the final charge had been framed on the 15th October was either unnecessary or vexatious. The witnesses who were called before that date could not be made in any way ground of complaint. It was only when the charge was put into shape, on the 15th October, that the accused Kassy Singh was called upon to meet by evidence the case of the prosecution. We have not been told in what manner he was in any degree prejudiced in the matter of meeting that case after the 15th October by the three or four witnesses who were subsequently called at the instance of the Deputy Magistrate.

On the whole, while, as I may repeat, we think it matter of regret that proceedings in a case of this kind should have been so prolonged, and so confusedly carried on as these proceedings have been, we do not see sufficient ground in law for saying that the conviction of Kassy Singh, at which the Deputy Magistrate arrived, was without jurisdiction, or such as we ought, in exercise of our general power of supervision, to set aside. We, therefore, decline to interfere on the matter of this reference.

With regard to the other reference, No. 54, we think that the Judge must be under some misapprehension. The order which was made by the Deputy Magistrate under Section 534 was consequent upon the conviction of the accused persons Hulkoree Singh and Altaf Kureem; and in that matter the Judge who has referred this case to us had jurisdiction to entertain an appeal. He did entertain an appeal, and acquitted the accused persons. He was, therefore, competent, by the very words of this Section 534 itself, to reverse or set aside the order which the Deputy Magistrate has made. That case must, therefore, go back to the Judge, and we decline to interfere in either reference.

The 30th March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Obstruction—Pathway—Jury—Act X. of 1872 Section 523.

(Miscellaneous Case.)

Roy. Omesh Chunder Sen, *Petitioner,*

versus

Ichanath Mozumdar, *Opposite Party.*

Baboo Biprodass Mookerjee for the Petitioner.

Baboo Bama Churn Banerjee for the Opposite Party.

In a case in which a Magistrate ordered a person either to remove an obstruction to a path leading to a road or to show cause why such order should not be enforced, and in which, subsequently, the Magistrate, on the application of the party charged, appointed a Jury under Section 523 of the Code of Criminal Procedure, it was held that the question the Jury should have been told to try was the question whether the first order of the Magistrate was reasonable and proper, and for the purpose to consider whether there was a *bonâ-fide* question between the parties as to the right of way over this particular piece of land.

Phear, J.—On the 31st December last the Assistant Magistrate in this case ordered that one Roy Omesh Chunder Sen be required either to remove the obstruction to the path leading from the thana-road to the river-bank in Damoor Mooder, or to appear before the Assistant Magistrate on the 6th January in person or by agent, and show cause why this order to remove this obstruction should not be enforced.

On the 6th January, it seems that Roy Omesh Chunder Sen did appear and object to this order, and asked that a Jury should be empannelled according to Section 523 of the Criminal Procedure Code. Accordingly a Jury was appointed; and eventually, after some delay, the Jury made a report, and on the 3rd March, after this report had been given in, the Assistant Magistrate passed the following order: "Forasmuch as on the "report of a duly constituted Jury it appears "that a public road within the village of "Doshomi, and leading from the thana-road "in a southern direction to the banks of the "river Matabhanga, has been obstructed by "the order of Roy Omesh Chunder Sen: "*Ordered*—That the said road, through the "garden of jack and mango-trees of the

"aforesaid Roy Omesh Chunder Sen, be "re-opened for the use of the public within "seven days, and let order issue accordingly."

Obviously, the provisions of the Criminal Procedure Code have not been very closely adhered to in this matter, because the question which, under Section 523, the Jury ought to have been directed to entertain and try was the question whether the first order of the Assistant Magistrate was a reasonable and proper order. And we need hardly say, for it has been before decided by this Court, that that order would not be a reasonable and proper order, if there was between the parties a *bond-fide* dispute as to whether the way which is alleged to have been obstructed was a thoroughfare for the benefit of the persons who complained of the obstruction or not, because, in such a case, the procedure which the Magistrate ought to follow would be, not the procedure of Section 521 and the immediately following Sections, but the procedure of Section 532, which is altogether different in its results, inasmuch as the order of the Magistrate, made in the course of such last-mentioned procedure, is at the most an order *nisi*, *i.e.*, an order operative only until the parties establish their civil rights.

In this case, then, the Jury ought to have been told to try whether the first order of the Magistrate was reasonable and proper, and for that purpose to consider whether or not there was a *bond-fide* question between the parties as to the right of way over this particular piece of land. Instead of a direction of this kind, the Assistant Magistrate prescribed to the Jury, on a first occasion, two questions, and afterwards three questions, of fact, which we need not now go into. And as the result of these questions, the Jury in their report returned a specific finding of fact. But, so far as we can perceive in this report, there is no finding to the effect that the petitioners who complained of this obstruction, eight or nine persons in number, had a right of way, either by reason of private right or public right, over the land in question. Had the Jury come to such a finding as this, although it would have been not strictly a finding such as they ought to have directed their attention to, still it might have been taken to amount to a finding that there was no reasonable and *bond-fide* dispute existing relative to the right of way. But the report of the Jury does not, in our judgment, amount to anything of this kind. It is, at the most, a statement that the way in question through this garden has been used by certain females of certain families who are not mentioned, for a very qualified purpose, during a period which is in itself insufficient to confer a right of way over the land. Thus, it seems to us that the report falls short of finding, either expressly or indirectly, that there was no *bond-fide* dispute between the parties as to the right of way over this land. This being so, there was, in fact, no finding of the Jury capable of being an answer to the question which they ought to have tried, namely, whether the order of the Magistrate was a reasonable and proper order or not. In other words, there was not a legal finding upon which the Magistrate could found his final order of the 3rd February 1874 in pursuance of the provisions of Section 523 of the Criminal Procedure Code. And, therefore, we think that this order, which purports to have been made in pursuance of, and in accordance with, the finding of the Jury, must be quashed.

The 31st March 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Evidence—Confession—Act I. of 1872, Section 30.

Committed by the Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of dacoity.

The Queen

versus

Sheikh Buxoo, *Appellant.*

Act I. of 1872, Section 30, which makes the confession of one prisoner evidence against persons other than the man who made the confession, applies only to cases in which the confession is made by a prisoner tried at the same time with the accused person against whom the confession is used.

Phear, J.—While we differ somewhat from the Sessions Judge in the view which he has taken of the corroborative evidence in this case, we agree with him, on the whole, in thinking that the prosecution has brought home the charge of dacoity to the prisoner Buxoo. The Sessions Judge says in his judgment: "I see no reason to disbelieve "the approver's evidence, which is corroborated by some evidence, showing that the prisoner was in the company of the dacoits "immediately before the occurrence, and "by the confessions of the prisoners who

"have been previously convicted." It seems to us that the Sessions Judge was wrong in attaching any value at all to the confessions of the prisoners who had been previously convicted. These prisoners were tried, as we understand, some of them in January 1873, and one of them in July 1873; in other words, they were not tried with the prisoner who has now been convicted. And Section 30 of the Indian Evidence Act, which alone makes a confession of this kind evidence in any degree against persons other than the man who made the confession, applies only to cases in which the confessions are made by prisoners tried at the same time with the accused person against whom the confessions are used. We think, therefore, that we are bound, on this appeal, to discard, as against Buxoo, the confessions of the prisoners who were tried previously, and not simultaneously with Buxoo.

But, even when this evidence is put on one side, we think that there is enough remaining on the record to corroborate the approver's evidence against Buxoo. If the approver is to be believed, there is no doubt of Buxoo's guilt. And the corroboration which is needed for the purpose of making the approver worthy of credit as against Buxoo is evidence which will tend to show that Buxoo, probably, was one of the party of the dacoits. The prisoner Buxoo himself, in the statement which he makes before the Sessions Court, says that, just after the dacoity, he heard that his name was mentioned as one of the dacoits, and that the police were coming to apprehend him; and he admits that thereupon he absconded—kept out of the way—for a considerable period to avoid being taken by the police. This in itself goes a very long way towards rendering it probable that the approver was only telling the truth when he said that Buxoo was one of the dacoits.

And, in addition to this, we have the fact disclosed by an independent witness, that Buxoo came with Gopal or Gobind Manjee, when the latter applied to him for the purpose of hiring the boat in which the dacoity was committed.

Taking these two items of corroborative evidence in connection with the approver's testimony, we are unable to say that the Sessions Court was wrong in giving credit to that testimony. And, therefore, we think that we ought not to disturb the conviction.

And with regard to the sentence, it seems to us, in view of all the facts of the case, that it is not unduly severe.

We, therefore, dismiss the appeal.

The 2nd April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Criminal intimidation—Jurisdiction—Journey—Error—Act XLV. of 1860, Section 503—Act X. of 1872, Sections 67 & 70.

(Miscellaneous Case.)

Peerun *alias* Kureemun Ayah, *Petitioner,*

versus

Mr. C. D. Field, *Opposite Party.*

Mr. C. Piffard for the Petitioner.

Mr. W. M. Bourke for the Opposite Party.

Where an offence of criminal intimidation under Section 503, Penal Code, was said to have been committed during a journey by railway from Bombay to Calcutta, it was held that the Magistrate of Howrah had no jurisdiction to entertain the charge, as the offence had not been committed within the actual territorial limits of his ordinary jurisdiction; and, further, that the case did not fall within Section 67 of the Code of Criminal Procedure, that Section (Illustration *a*) giving jurisdiction to the local tribunal at the place where the complainant or the offender first stops or breaks his journey; such journey must be a continuous journey from one terminus to another.

Section 70 of the Code of Criminal Procedure contemplates such an error only of jurisdiction as may arise from a case being tried in one district or sessions division of a province, where it ought properly to have been tried in the neighbouring district or sessions division, and does not apply to cases in which the right local jurisdiction is a jurisdiction foreign to the Court which has power to order a new trial, and which lies entirely outside the province to which the local division or district belongs, in which the charge was actually entertained.

Phear, J.—On the 16th March last, two charges were made against the petitioner Peerun Ayah in the Court of the Magistrate of Howrah. They were to the following effect respectively: *first*, "that she, on or "about the 25th day of February 1874, near "Allahabad, and when travelling down from "Bombay to Calcutta by rail, criminally intimidated Mrs. Florence Field, and thereby "caused her alarm, and that she has thereby "committed an offence punishable under Section 503, Indian Penal Code, and within my "cognizance" (*i.e.*, the cognizance of the Magistrate of Howrah); *second*, "that she, "between the 27th February and 11th March "1874, published imputations against Mrs. "Field's character of such a nature as to "harm her reputation."

It is somewhat unfortunate that these charges should be so defective as they are in the non-statement of material facts. And it is still more unfortunate that we have not

before us the formal conviction or finding come to by the Magistrate upon these charges, which might possibly have the effect of remedying these defects. According to the judgment which has been sent up to us by the Magistrate, it appears that the Magistrate found Peerun Ayah guilty of both these charges, that is, in general terms, *first*, that she committed criminal intimidation; and, *secondly*, that she committed defamation against Mrs. Field; and the Magistrate sentenced her on the first charge to pay a fine of Rs. 15, leviable under Section 61 of the Criminal Procedure Code, and, in default thereof, to one month's rigorous imprisonment. And the Magistrate further sentenced her on the second charge to six weeks' rigorous imprisonment.

It is objected before us upon the present application that these two convictions are both bad upon two grounds: *first*, that they were come to without jurisdiction; and, *secondly*, that there was no evidence before the Magistrate sufficient in law to establish either of them.

We are of opinion that the first objection is good in respect of both the convictions. We also think that there was no evidence before the Magistrate upon which the second conviction could be sustained in law.

It is clear that the offence of criminal intimidation was not, according to the account of the prosecution, committed within the actual territorial limits of the ordinary jurisdiction of the Magistrate of Howrah. In the words of the charge itself, it is stated as having been committed somewhere near Allahabad. If the Magistrate of Howrah had jurisdiction to entertain the first charge preferred against the petitioner, admittedly this must be by reason of the special enactment of Section 67 of the Criminal Procedure Code. That Section runs in these words: "When it is uncertain in which of "several districts an offence was committed; "or where an offence is committed partly in "one district and partly in another; or where "the offence is a continuing one, and conti-"nues to be committed in more districts "than one; or where it consists of several "acts done in different districts, it may be "inquired into and tried in any one of any "such districts."

Now, under the words of this Section alone, it would be impossible to hold that an offence which was committed locally in the neighbourhood of Allahabad, and unquestionably far outside of the District of Howrah, could be entertained by the Magistrate of the District of Howrah. But there is a certain enlargement of the words of this Section, applicable to the case which is now before us effected by the Illustration *a* which is appended to the Section. This illustration is the first of several illustrations appended to the Section, and may be reasonably taken as a rider to the first paragraph of the Section itself. It is in these words: "An offence committed on "a journey or voyage may be inquired into "and tried in any district through which the "person by whom the offence was commit-"ted, or the person against whom, or the "thing in respect of which, the offence was "committed, passed in the course of that "journey or voyage."

This illustration is plainly larger than the first paragraph or any other enacting portion of the Section itself, and we ought not, therefore, to carry it further than its own words go. It is directed to meet a particular difficulty, which is very analogous to, but not, strictly speaking, comprehended within, those covered by the general description of the Section. When an offence is committed during a journey or voyage, even if the place of the occurrence is single and completely known, yet practically in most cases it would be impossible for the complainant to have recourse to a tribunal on the actual spot. The illustration to the Section affords relief by giving jurisdiction to the local tribunal at the place where the offender either stops, or is made to stop, or at the place where the complainant stops. But we think this means, where either of them first stops, or breaks his journey or voyage. Any greater extension of meaning is not needed to meet the exigency of the case, and would be calculated to produce much mischief. It appears, therefore, to us that the journey spoken of in this illustration is a continuous journey from one terminus to another terminus, regard being had, for the purpose of estimating the continuity, to all the ordinary incidents affecting journeys of the particular kind which may be under consideration. Now, according to the evidence which has been sent up to us by the Magistrate, the journey on which the offence, which is the subject of the first charge, is alleged to have been committed, was a journey by railway effected by Mrs. Field, the prosecutrix, or, at any rate, by the petitioner Peerun Ayah, from Bombay to Calcutta. But it is also perfectly plain from that evidence, and it has been admitted by the learned Counsel who appears in this case on the part of the

Crown, that that journey was not effected continuously either by Mrs. Field or by the Ayah. Both of them stopped at Allahabad, after the occurrence had taken place which is the foundation of the first charge—that is, after the offence, as alleged, had been committed: Mrs. Field for at least a space of two days, and the ayah for the space of at least one day. And this stoppage was not a stoppage due to the nature of the journey itself, because the journey might have been completed without any appreciable stoppage whatever, simply by continuing in the train in which these persons were passengers before they came to Allahabad, and which, after it reached Allahabad, proceeded with continuity to complete the journey to Calcutta. Mrs. Field, instead of continuing her journey, stopped at Allahabad, and remained there certainly for two days, and Peerun Ayah, who, it is material to remark, had been discharged by Mrs. Field, and forbidden to continue her journey with her, also remained at least one day. We are of opinion, on this state of facts, that the case does not fall within the Illustration *a* of Section 67, and that the Magistrate had no jurisdiction to entertain the charge of criminal intimidation committed, according to the story of the prosecution, somewhere near Allahabad, and certainly at some place external to the territorial limits of his own jurisdiction.

The construction which we have thus placed upon the words of the Illustration (*a*), Section 67, is not a novel construction, for it was given by the Madras High Court in the decision which is reported in 1 Madras 93. It is not, perhaps, necessary for us to explain the grounds upon which we are of opinion that the Magistrate had no jurisdiction to entertain the charge of defamation upon which he convicted the petitioner, because the Magistrate himself, in the return which he has made to this Court upon notice given to him of this application, has admitted that he had no jurisdiction to entertain the charge, inasmuch as the evidence did not serve to show that the offence was committed within the area of his ordinary jurisdiction, and this matter was not within the scope of Section 67, Criminal Procedure Code. We will, however, say that, not only was there no evidence before the Magistrate upon which he could, with any sort of reason, come to the conclusion that he had jurisdiction to entertain that charge, but there was no evidence whatever before him upon which a charge of defamation of Mrs. Field by Peerun Ayah could be maintained anywhere. There is no evidence upon the record, which has been sent up to us, of Peerun Ayah's having anywhere spoken defamatory words of Mrs. Field, unless it be of her having done so at the same place and as part of the same transaction which constituted the foundation of the charge of criminal intimidation near Allahabad. If the charge of defamation had been properly drawn, the Magistrate would have perceived without difficulty that there was not an iota of evidence before him upon which it could be sustained for a moment. Indeed, there was nothing in the information or otherwise before him on which he could even frame a proper charge. We, therefore, as I have already said, are of opinion that both these convictions are bad for want of jurisdiction, and we think that we ought not, upon the ground put forward in Section 70 of the Criminal Procedure Code, to forbear from setting the conviction aside. That Section says: "No sentence or order of any Crimi-"nal Court shall be liable to be set aside, "merely on the ground that the investiga-"tion, inquiry, or trial was held in a wrong "district or sessions division, unless it is "proved or appears that the accused person "was actually prejudiced in his defence, or "the prosecutor in his prosecution, by such "error, in either of which cases a new trial "may be ordered."

It is obvious, from the last words which I have read, that this Section contemplates such an error only of jurisdiction as may arise from a case being tried in one district or sessions division, say of Bengal, when it ought properly to have been tried in the neighbouring district or sessions division of the same province, because it evidently contemplates the possibility of the Court being able to direct a new trial. It does not apply to cases such as that of the first charge, in which the right local jurisdiction is a jurisdiction foreign to the Court which has power to order a new trial, and lying entirely outside the province to which the local division or district belongs, in which the charge was actually entertained.

And, again, as to the second charge, we think that there is enough in this case to lead us reasonably to conclude that the error made in the matter of jurisdiction prejudiced the accused in her defence, because we think she never ought to have been called upon to answer that charge at all, and the Court which would have disposed of the charge in Calcutta, where the defamation is supposed to have taken place, would have been substan-

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tially different, both as regards constitution and procedure, from that of the Magistrate of Howrah.

For all these reasons, we are of opinion that, not only were the convictions had without jurisdiction, but that, in respect to one, at any rate, the conviction could not be in any degree supported; and that both convictions ought to be set aside. We accordingly set aside both the conviction and the sentence, and remit the fine; and, if the fine or any portion of it has been paid, it must be refunded.

The 2nd April 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Evidence—Accomplice—Corroboration—Confessions of co-prisoners—Jury—Act I. of 1872, Sections 30 & 114.

Reference to the High Court, for confirmation of the sentence of death, by the Officiating Additional Sessions Judge of the 24-Pergunnahs.

The Queen

versus

Sadhu Mundul, *Prisoner.*

HELD, on a consideration of the Indian Evidence Act, I. of 1872, Section 114, that the Legislature intended to lay down as a maxim or rule of evidence that the testimony of an accomplice is unworthy of credit, so far as it implicates an accused person, unless it is corroborated in material particulars in respect to that person; and it is the duty of a Court which has to deal with an accomplice's testimony to consider whether this maxim applies to exclude that testimony or not, and in a case tried by Jury to draw the attention of the Jury to the principles relative to the reception of an accomplice's testimony.

A Judge should charge the Jury that the mere confessions of prisoners tried simultaneously with the accused for the same offence, which are in a very qualified manner made operative as evidence by Act I. of 1872, Section 30, are only to be rated as evidence of a defective character, and that they require specially careful scrutiny before they can be safely relied on.

Phear, J.—THE facts of this case are of a somewhat unusually interesting character, and have been brought out exceedingly well at the trial. But it is not necessary for the explanation of our decision in the matter of this reference that we should reproduce them at full length. It is enough to say that, about the 20th December last, a boat was discovered near the Parthelnuggur police-station floating with the tide in the river. No living creature was on board the boat, but there was found in it the body of a man, who had apparently been dead some two days or so; and also various articles, such as quilts, clothes, a gamcha, a lotah, &c. The appearances of the body, disclosed on *post mortem* examination by the Civil Surgeon at Alipore, led to the presumption that the deceased had died a violent death by strangulation, and eventually three persons, namely, Sadhu Mundul (the subject of this reference), Mudhu Mundul, and Biknath were put upon their trial at the Sessions Court for murder of the deceased. By means of a considerable amount of satisfactory evidence, the body was identified as being that of one Badul Ghazi, who, with one Mudhu Mundul as companion, had some few days before 20th December started from his native village for Calcutta in a boat. Mudhu Mundul also appears to have accounted very clearly for his separation from Badul, and the only part of the case which seriously tasked the attention and discrimination of the Sessions Court consisted of the evidence by which the prosecution endeavoured to bring home the charge of murder to the three prisoners. This evidence was the testimony of an approver Dinu Bagdi, the confessions of the three prisoners themselves made before the Magistrate, and one fact of supposed corroboration brought out by the deposition of the Civil Surgeon.

The approver's story was shortly to the following effect: That the three prisoners persuaded him to go in a dinghee with them to rob Badul, whom they had discovered sleeping alone in a boat; that, on coming alongside this boat, Sadhu struck Badul with a paddle, and, when he rose making an alarm, struck him again, and that then Sadhu and Mudhu entered the boat, and throttled him. With regard to this testimony, the Sessions Judge told the Jury: "You must decide whether you will "believe this man's version of the affair. It "is usual for Judges to tell Juries that the "evidence of an accomplice is to be received "with caution, and this is very properly done "when the evidence of the accomplice is the "only evidence against the prisoners. This, "however, is not a case of that description. "There is here other evidence besides the "testimony of the accomplice. There are "the confessions of the three prisoners made "before the Magistrate * * * * *, and there "is yet a third source of evidence, and that "is the agreement between the confessions; "between the confessions and the evidence of "the accomplices; and between these state-"ments and the facts of the case proved by "other and independent evidence. The other "two prisoners and the approver say that

"Sadhu was foremost in the matter, and "struck the first blow. Sadhu himself says "the same (these advert to the other points "of agreement). You have heard that the "accomplice and Biknath were kept "separate: and these two again were kept "separate from Sadhu and Mudhu, who "were subsequently arrested. In considering "whether you believe the confessions and "the accomplice's testimony, you will "properly consider this agreement between "them. Then, again, the medical evidence "shows death to have been the result of "strangulation, and this agrees with the "account given by the accomplice and the "prisoners that the man was throttled."

It appears to us that the directions which the Judge thus gave to the Jury are not entirely correct, and we have had some difficulty in satisfying ourselves whether or not the defect in them prejudiced in any substantial degree the trial of the prisoner Sadhu, whose case is now before us.

We think the Sessions Judge erred in saying to the Jury, as he in effect did, that it was not proper or necessary for him in the present case to tell them that the evidence of the accomplice was to be received with caution.

We also think that the Sessions Judge erred in omitting to instruct the Jury that, as regards each prisoner, the confession of his follow-prisoner was at best the evidence of an accomplice.

And, lastly, we think the Sessions Judge erred in directing the Jury that the corroboration of the approver's story, which was afforded by the medical evidence, was of such a nature as to strengthen the approver's testimony against the prisoner.

The principles which should govern the reception and appreciation of an approver's or accomplice's evidence in criminal trials were fully and authoritatively laid down by this Court in the case of Reg. *v.* Elahee Buksh,* and since the date of that decision they have become matter of legislative enactment.

Section 114 of the Indian Evidence Act says that "the Court may presume the "existence of any fact which it thinks likely "to have happened, regard being had to the "common course of natural events, human "conduct, and public and private business, in "their relation to the facts of the particular "case;" in other words, it authorizes the Court to take as a fact, although not immediately proved by evidence, that which it thinks likely to be a fact, regard being had to the facts which are proved by evidence, and to the common course of events, &c.

As an illustration of the meaning of this Section, it is mentioned (Clause *b*) that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. This is a legislative declaration that, regard being had to the common course of natural events and human conduct, an accomplice is unworthy of credit so far as his testimony implicates another person, unless he is corroborated in material particulars in respect to that person.

And in a later paragraph of the same Section it is enacted that, in considering whether this particular maxim does or does not apply, the Court shall have regard to such facts as the following: "A crime is "committed by several persons, A, B, and C. "Three of the criminals are captured on the "spot, and kept apart from each other. "Each gives an account of the crime "implicating D, and the accounts corroborate "each other in such a manner as to render "previous concert highly improbable."

Lastly, Section 133 of the same Act says: "An accomplice shall be a competent witness "against an accused person, and a conviction "is not illegal, merely because it proceeds "upon the uncorroborated testimony of an "accomplice."

On the whole, the result appears to be that the Legislature has laid it down as a maxim or rule of evidence resting on human experience that an accomplice is unworthy of credit against an accused person, *i.e.*, so far as his testimony implicates an accused person, unless he is corroborated in material particulars in respect to that person; that it is the duty of the Court which in any particular case has to deal with an accomplice's testimony to consider whether this maxim applies to exclude that testimony or not; in other words, to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case, though, at the same time, the Court may rightly in exceptional cases, notwithstanding the maxim, and in the absence of this corroboration, give credit to the accomplice's testimony against the accused, if it sees good reason for doing so upon grounds other than, so to speak, the personal corroboration.

Now, in the case of a trial by Jury, it is the function of the Jury to ascertain the facts upon the evidence before them, and for that purpose to be guided by the law which

* 5 W. R., Cr., 80.

is applicable; and it is in all cases the duty of the Judge to point out to them that law (Sections 255 and 256, Criminal Procedure Code). It was, therefore, in the present case, the duty of the Judge to lay before the Jury substantially, to the effect just set out, the principles relative to the reception of an accomplice's testimony, which the Legislature sanctioned by the Indian Evidence Act; and we think the Judge was wrong in telling the Jury that this case was one in which no caution or instruction from him was needed on this head. It is in all cases where an accomplice's testimony is admitted incumbent on the Judge to inform the Jury of the results of the law bearing on this point, substantially as we have just endeavoured to explain it.

With regard to the second error committed, as we think, by the Judge in his summing up in this case, it need hardly be pointed out that, if the testimony of an accomplice given before the Court, under a process of careful examination, and capable of being tested by cross-examination, is yet by its nature such that, as against the accused, it must be received with caution, still more so must be the confession of a fellow-prisoner, which is only the bare statement of an accomplice limited to just so much as the confessing person chose to say, and guaranteed by nothing except the peril into which it brings the speaker, and which it is generally fashioned to lessen. Until the passing of the Indian Evidence Act, such dangerous material as this could not be used as evidence against the accused person, and even by that Act the Legislature only bestowed a discretion upon the Court to "*take into consider-*" *ation* such confession as against such other "person as well as against the person who "makes such confession" (Section 30). This Court has more than once (Reg. *v.* Mohesh Biswas and others, 19 W. R. 16; Reg. *v.* Belait Ali Utunshi, 19 W. R. 67) dealt with this topic, and we need not dwell upon it now.

It is true that the instance of corroboration which is appended to Illustration (*b*) of Section 114, and which has been already referred to, is corroboration to be found in accounts of an occurrence given by accomplices; but it is noticeable that the Legislature expressly makes it a condition to the validity of this corroboration, that these accomplices should have been "captured on the spot, and kept apart from each other," and, moreover, there is not the slightest indication that the Legislature intended in this passage by the term 'accounts given by the accomplices' anything other than accounts given in due course of examination as witnesses. In view, therefore, of the stringent condition which the Legislature has here prescribed as essential to the corroborative force of the accomplice's account, we think that the mere confessions of prisoners tried simultaneously with the accused for the same offence, which are in a very qualified manner made operative as evidence by Section 30, do not come within the scope of this legislative declaration, that, under the special circumstances mentioned, the account given by one accomplice may be treated as corroboration of the account given by another. And we are, therefore, of opinion that the Judge ought not only to have told the Jury that the confessions of the prisoners tried with Sadhu were, as against him, to be rated and valued at best as accomplice's testimony, but further that these confessions were, for the reason above given, evidence of a peculiarly infirm and defective character, requiring specially careful scrutiny before it could be safely relied on.

With regard to the third error which we have attributed to the Judge, very little need be said. The corroboration of the accomplice's account, such as it is, which is afforded by the result of the medical examination of the body, is corroboration in respect to a fact in the occurrence which does not help the prosecution in any way to prove that the prisoner was one of the persons who caused the deceased's death; it is corroboration of the accomplice's testimony only to this extent, namely, it shows that his story as to the manner and the mode of the man's death is correct, and therefore it serves to make it most probable that he, the accomplice, was present when the death was caused. In other words, it is corroboration of the accomplice's story as against himself, but it is not in any degree corroboration of the story so far as it goes to implicate the prisoner.

I have already said that we have had hesitation in satisfying ourselves whether or not the defects which seem to us apparent in the Judge's charge to the Jury had the result of prejudicing the prisoner in his defence.

On the whole, however, and after the best consideration which we have been able to give to the case, we think that they have not had this result. The witnesses appear to have been most carefully examined before the Sessions Court. The story which each told was brought out simply, and no irrelevant matter was allowed to enter into the case of the prosecution. The Jury must have had

all the evidence and material facts of the case plainly before them; indeed, the Judge's charge, notwithstanding the faults which we have been obliged to find in it, drew the attention of the Jury to every material fact in the case. And, finally, if the Jury believed the confession of the prisoner himself, as they probably did, then that confession was sufficient alone to support the verdict at which they arrived, and certainly afforded the most effective corroboration of the testimony given by the approver.

We, therefore, feel ourselves unable to come to the conclusion that the prisoner was materially prejudiced in his trial and in his defence by the defects which we have noticed in the Judge's charge to the Jury; and, consequently, we think that we ought not to interfere with the verdict.

But, having regard to the hesitation which we have undoubtedly had upon this point and to the length of time during which this reference has been pending before this Court in consequence of that hesitation, we are of opinion that the extreme penalty of the law ought not to be carried out, and, accordingly, we reduce the capital sentence to a sentence of transportation for life.

The 11th April 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, L. S. Jackson, J. B. Phear, W. Markby, F. A Glover, W. Ainslie, C. Pontifex, E. G. Birch, and G. G. Morris, *Judges*.

Alternative charge—False evidence—Act XLV. of 1860, Section 193.

Committed by the Deputy Magistrate, and tried by the Additional Sessions Judge of the 24-Pergunnahs, on a charge of fabricating false evidence.

The Queen

versus

Mahomed Humayoon Shah, *Appellant.*

Mr. W. Jackson for the Appellant.

The Advocate-General and *Baboo Juggadanund Mookerjee* in support of the conviction.

HELD by the majority (Jackson, J., dissenting) that a charge framed on the model given in Schedule III. of the Code of Criminal Procedure charging the accused upon two charges with having made contradictory statements in the course of judicial proceedings under Section 193, Penal Code, is a good charge, and that (Phear and Jackson, JJ., dissenting) the Court or Jury, if convicting, need not, by direct evidence, find which of the two statements is false; all that is necessary being that the Court or Jury should find that the allegations made in the charge are proved.

This case was referred to a Full Bench by Jackson and Milter, JJ., on the 17th September 1873, with the following remarks:—

Jackson, J.—THE question raised in the present case is whether the conviction of the prisoner is valid. The offence of which the prisoner is convicted is stated in these words: "That he did, on or about the 23rd "day of January 1873, at Alipore, in the "course of the trial of Toolsee Dass Dutt "and Mahomed Luteef, on a charge of cheat-"ing, state in evidence before Moulvie "Abdool Luteef, Deputy Magistrate at "Alipore, that 'the greater part of the fur-"nitures were sent by me to that house "(*viz.*, the house at Chitpore), and a small "portion by Belilios and Zuhooroodeen;' "and that he did, on or about the 13th day "of February 1873, at Alipore, in the course "of the trial of J. R. Belilios, Toolsee Dass "Dutt, and Mahomed Luteef, in the same "case of cheating, state in evidence before "Moulvie Abdool Luteef, Deputy Magis-"trate at Alipore, that 'Belilios never sent "any furniture of his own, or of any one "else, to that house (*viz.*, the house at Chit-"pore), nor was any of the furnitures in "that house belonging to Belilios:'" and it is said that one of these two contradictory statements the prisoner "either knew or "believed to be false, or did not believe to be "true, and that he has thereby committed an "offence punishable under Section 193 of the "Indian Penal Code." It is not found that one or the other of these statements is, in fact, false, or that either of such statements, if false, was intentionally given; but the conviction manifestly rests upon the simple circumstance that the two statements are contradictory one of the other. It has been contended that neither Section 193 or Section 72 of the Indian Penal Code, nor any provision of the Criminal Procedure Code of 1872, justifies such conviction. There is a ruling of the Full Bench in 6 W. R., Criminal Rulings, p. 65, which supports the conviction, but the authority of that decision has been questioned in several later cases, *viz.*, the case of Queen *v.* Mati Khowa in 3 B. L. R., Cr. App. Juris., p. 38; *

* 12 W. R., Cr., 31.

the case of Queen *v.* Nomal in 4 B. L. R., Criminal Rulings, p. 9;* in 9 W. R., pp. 25 and 54; and in 12 W. R., p. 11. For myself, I feel bound to say that I always entertained the contrary opinion. I expressed that opinion on the occasion of a case coming before the English Committee of this Court in 1862, the papers of which case are appended to this record. It may be suggested that this reference is not necessary, inasmuch as the decision of the Full Bench is partly based on the terms of Section 381 of the old Code of Criminal Procedure, which is no longer in force; but I think it cannot be denied that, if the reasoning of Sir Barnes Peacock in that case is carried to its full extent, it will also hold good under the new Code of Criminal Procedure. It is also pointed out that Schedule III. annexed to the Procedure Code contains the form of an alternative charge under Section 193, and from this it may be supposed that the intention of the Legislature was to make a conviction in that form perfectly good. As at present advised, I think this is not so; and on all considerations I think this matter should be referred to a Full Bench for an authoritative ruling.

Mitter, J.—I agree in the order of reference. I do not wish, however, to express any opinion upon the point in question.

Before the Full Bench, *Mr. Jackson*, for the appellant, contended that, under Section 452 of the new Criminal Procedure Code, there must be a separate charge for every distinct offence, except in certain cases. Those cases, so far as they are relevant to the inquiry in the present case, are contained in Section 455, which gives the reasons for permitting a breach of the general rule in Section 452, and which also enacts for the *first time* that there *may* be an *alternative charge*. The forms given in Schedule III. of the Criminal Procedure Code are simply the old forms contained in the old Criminal Procedure Code, with the addition of an example of an alternative charge.

Section 257 of the new Criminal Procedure Code distinctly enacts that it is the duty of the Jury to decide which view of the facts is true, and the Illustration (*a*) of that Section shows clearly that, for instance, in the case of murder or culpable homicide, in which an alternative charge might be framed under Section 455, no Jury would be permitted to give in an alternative finding that he committed either culpable homicide or murder.

Section 263, para. 2, of the new Criminal Procedure Code says that "the Jury shall "return a verdict on all the charges on "which the accused is tried." This shows clearly that, should the officer drawing up the charges choose to treat them as distinct offences, which he is entitled to do under Section 455, instead of drawing up the charge in the alternative under that Section, according to the provisions of Section 263, the Jury would be bound to return a finding on each and every one of the charges. Thus it is that the Legislature, in this case, distinctly and by a positive enactment, does away with the right of Juries to return an alternative finding on two distinct charges which, previous to the framing of the present Procedure Code, the High Court, by a Full Bench ruling reported in 6 Weekly Reporter, p. 65, and the Madras High Court, by a Division Bench ruling reported in 4 Madras High Court Reports, p. 51, had held could be done.

If an alternative charge were compulsory, there might be some force in the argument that the Legislature, in making an alternative charge, intended that an alternative finding should follow; but surely the Legislature could not have intended that this should be the case, where it depended solely upon the officer drawing up the charges as to whether they are to be drawn distinctly in separate charges or in the alternative.

Again, if an alternative finding be good, a man, if convicted, might be tried twice for the same offence, because Section 460, which provides for the plea of previous acquittal or conviction, would be no bar, since it simply enacts that no man shall be liable to be tried again on the same facts for the same offence.

Let us now consider the rulings of the Madras and Calcutta High Courts, and see how they are warranted by the procedure on which they are based.

Sir Colley Scotland distinctly says that he would have applied the sound rule established by the case of the King *v.* Harris (5 Barn. and Ald. 296), had the Criminal Procedure Code required the same precision with which the Madras High Court treats Section 242 of the old Procedure Code as incorporated and forming part of Sections 381 and 382.

Section 242, His Lordship says, applies to cases in which two or more offences are committed, and that, in a case of false evidence with an alternative finding, there could not have appeared at any time more

* 12 W. R., Cr., 69.

than a single offence. His Lordship then proceeds to meet this argument by a reference to the whole enactment, whereas, if his Lordship had only referred to Sections 240 and 241, he would have seen that all the other cases were provided for by these Sections; and that Section 242 referred to the case where only one offence appeared to have been committed, and to that offence alone.

His Lordship goes on further to say that, because charges on both statements were proper under Section 242, it follows clearly that conviction in the alternative is valid. His Lordship cites no authority for this proposition, which, if it follows as a matter of course, puts an end to all argument under the new Procedure Code; for, under this Code, an alternative charge is expressly permitted to be made.

In the case of Queen *v.* Mussamut Zumeerun, 6 Weekly Reporter, p. 65, the Calcutta High Court, consisting of Sir Barnes Peacock, Mr. Justice Norman, Mr. Justice Kemp, Mr. Justice Seton-Karr, and Mr. Justice Campbell, held (Mr. Justice Norman and Mr. Justice Campbell, however, doubting) that an alternative finding was good, on the ground that, quite independently of Section 242, it came directly within the letter and spirit of Sections 381 and 382 of the old Criminal Procedure Code. The Court seems to treat Clause 5 of Section 382 as if it stood alone, and formed no part of Sections 381 and 382, and which distinctly express the cases where an alternative charge is permitted. The Court says that Clause 5 is only an example. That may be conceded. But if the words are to be taken literally in Clause 5 without any reference to Section 381, of which it is an example, a man might be charged with rape in the first head, and assaulting a public servant in the execution of his duty in the second head of the charge, and the finding might be that he is guilty of either the one or the other. This surely could not have been the intention of the Legislature.

Since, however, these decisions, Mr. Justice Norman, in the case of The Queen *v.* Mati Khowa, 12 Weekly Reporter, p. 31, has emphatically expressed his dissent from the Full Bench ruling, and Mr. Justice Markby, in the case of The Queen *v.* Bedoo Noshyo and others, in 12 Weekly Reporter, p. 13, has done the same, saying that the words of the old Section 381 seemed too clear to admit of doubt.

The *Advocate-General*, contra, contended that the charge of the Judge in the alternative was correct, and that the finding of the Jury also was valid. In the present case, the prisoner did not make merely two contradictory statements, but he made two contradictory statements, one of which he must either have known, or, at all events, believed, to have been false. Under the circumstances, the Judge was right in charging the Jury in the following terms:—

"Now, you must clearly understand that it "is not sufficient that the accused is shown "to have made contradictory statements. "Such contradictions might arise from faulty "memory or mistake, or some other innocent "reason. Before you can find him guilty, "you must be satisfied that he made one or "other of the statements, knowing that such "statement was false, and deliberately "intending to make a false statement."

It was said by Mr. Jackson that no evidence was adduced at the trial to prove that either of the statements of the prisoner was false, but the Jury were well aware of this fact, for, in the first paragraph of the Judge's charge to the Jury, it was pointedly brought to their knowledge; and the Jury having still convicted the prisoner, even in the absence of this evidence, proves most clearly that they must have been of opinion that the mere fact of the prisoner's having made two statements diametrically contradictory to one another in relation to the same matters was sufficient in their minds to come to the conclusion that he had deliberately given false evidence. Besides, in addition to these two contradictory statements, there were many other things stated by the prisoner which go to show that he voluntarily, and with full intention, gave false evidence. Under these circumstances, the Jury were perfectly justified in arriving at the conclusion they did, and, having so arrived, the offence committed by the prisoner, *viz.*, of giving false evidence, became directly punishable under Section 193 of the Indian Penal Code, which says that, "Whoever intentionally gives false evidence "in any stage of a judicial proceeding, or "fabricates false evidence for the purpose of "being used in any stage of a judicial pro- "ceeding, shall be punished with imprison- "ment of either description for a term which "may extend to seven years," &c.

Now, in this country, in a charge of perjury, it is not necessary to prove that the contradictions of the prisoner were material; nor is it necessary to prove which particular part of his evidence is false. For instance, if a man were to come to a witness-box, and to swear deliberately that he saw

A bribing B with money on a certain day, and he were to come again the next day to the witness-box, and to swear positively that he never saw A bribing B with money, that man would, undoubtedly, be liable to be punished, under the 193rd Section of the Indian Penal Code, for having given false evidence on one of the two occasions, although it could not be proved which statement of his was false.

Let us now see if, independently of the facts and circumstances of the present case, an alternative charge would be considered valid in law, when a man has made in a judicial proceeding two statements contradictory of one another, and when it is doubtful which of the two statements is false.

Under Section 193 of the Indian Penal Code (which Section punishes a person who has deliberately given false evidence in a judicial proceeding), there is a Schedule, numbered III., annexed to the new Criminal Procedure Code, which contains the form of an alternative charge. By the insertion of this form into the Schedule, it clearly shows that, in cases like the present, it was the intention of the Legislature to make a conviction in this form perfectly good. If such was not the intention of the Legislature, where was the object of inserting this form at all into the Schedule? It is idle to suppose that the Legislature had no motive whatever in framing this form.

Sir Barnes Peacock, in the case of The Queen *v.* Mussamut Zumeerun, reported in 6 Weekly Reporter, p. 65, said: "I have no "doubt that there may be an alternative "finding as well in a case in which the "evidence proves the commission of one of "two offences falling within the same Section "of the Penal Code, and it is doubtful which "of such offences has been proved, as in "one in which the evidence proves the "commission of an offence falling within one "of two Sections of the Penal Code, and it "is doubtful which of such Sections is "applicable. This appears to me quite clear "when Section 381 of the Code of Criminal "Procedure is read together with Section "242, and Clause 5, Section 382 of that "Code."

And Sir Colley Scotland, in the case of The Queen *v.* Ross, 6 Madras High Court Reports 344, confirming the judgment which he held in the case of The Queen *v.* Palamy Chetty, 4 Madras High Court Reports, p. 51, said: "A good conviction, it is true, may take "place on proof of two contradictory state-"ments without confirmatory evidence as "to the falsity of either, when both are on "oath, and made the subject of separate "charges; but that is because the Code of "Criminal Procedure provides for a convic-"tion in such a case upon an alternative "finding as to the truth or falsity of one or "the other statement."

An alternative charge and an alternative finding are, therefore, valid in law under Section 193 of the Indian Penal Code.

The judgments of the Full Bench were delivered as follows:—

Morris, J.—I think it sufficient to say upon this reference that, in my opinion, the conviction arrived at by the Jury upon two charges framed in the alternative form, according to the model given in Schedule III. of the Criminal Procedure Code, is good in law. It seems to me that the two statements embodied in each charge, which were made by this prisoner, must be taken together, and that, when so taken together, they comprehend the specific offence of intentionally giving false evidence in a stage of a judicial proceeding. It is possible that each of the statements, and not one of them merely, was in itself false, and that, taken singly, each might have afforded good ground for a distinct charge of an offence under Section 193 of the Penal Code; but this course was not followed. The simpler course allowed by the law was adopted of framing a charge containing two contradictory statements of such a nature that the two, *when taken in combination*, disclosed the specific offence of intentionally giving false evidence. It must be matter of evidence whether the contradictory statements contained in the charge are *per se* so irreconcilable that one of them is necessarily false, and also that the prisoner, in making them intentionally, spoke falsely in regard to one of them. This it is the province of the Jury or Court to determine, and in the present instance the Jury had no difficulty in arriving at such a determination. It seems clear that the new Code of Criminal Procedure has expressly contemplated, and, indeed, provided for, this result. When Section 412 provides that the charge may be in the form given in the 3rd Schedule, and when the 3rd Schedule gives an alternative form of charge in these words: "That you, on "or about (such a date and place), in the "course of the enquiry into (such a matter), "and before (such an officer), stated in evi-"dence (such and such words), and that you, "on or about (such another date and place), "in the course of the trial of (so and so), "before (such an officer), stated in evidence

"(such and such other words), one of which "statements you either knew or believed to "be false, or did not believe to be true, and "thereby committed an offence punishable "under Section 193 of the Indian Penal "Code," I cannot but hold that, if those statements are radically contradictory one of the other, so that the contradiction involves of necessity a falsehood, and it be proved that the deponent uttered them, and that he, by so doing, deliberately intended to speak falsely, the substantive offence of intentionally giving false evidence in a stage of a judicial proceeding is thereby established, and no need exists to determine by distinct evidence which one of the two statements is absolutely false. No doubt, strictly speaking, this form of charge is not an alternative charge in the sense contemplated by Section 455, Criminal Procedure Code. This is not a case where two or more offences are disclosed by the single act or set of acts committed, or rather alleged to have been committed, by the accused, and it is doubtful what particular offence in law can be found on the facts proved; but the alternative consists in this, that of two statements made by the accused, one or other of them, it does not matter which, inasmuch as the two involve an absolute contradiction, must be of such a nature that the person making it either knew or believed it to be false, or did not believe it to be true. It is, as already said, expressly to meet this particular kind of offence that Schedule III. contains a specific form described as a form for "alternative charges on Section 193" of the Indian Penal Code. If it were intended that the Jury or Court should find which of the two statements set out in the charge was false, not only would this form be cumbrous and unmeaning as an alternative form, but the force of the two contradictory statements in combination would be entirely lost, so as to enable such Jury or Court to determine that the accused knew or believed one of the statements to be false, or did not believe it to be true, and that he *thereby* committed an offence under Section 193 of the Indian Penal Code.

Birch, J.—I concur with Mr. Justice Morris.

Ainslie, J.—I am also of opinion that the conviction on a charge framed in the form given in the 3rd Schedule of Act X. of 1872 is good, although it may not declare which of the two statements set out in the charge is false. By Section 442 of the Act, a charge in that particular form is declared to be a good and valid charge. If it is a good charge to try a man on, it appears to me to follow, of necessity, that it must be a good charge to convict him on; and there is nothing in Section 461 which requires that the circumstances which constitute the offence should be set out in the conviction.

It appears to me that this is not a case which comes under the second part of the Section, which refers to offences punishable under different Sections, or parts of a Section, of the Penal Code, but that it falls under the first part of Section 461. If the Court comes to the conclusion that the accused person must, of necessity, have given false evidence, it is sufficient, under the first part of Section 461, to state in the conviction that he has given false evidence, and is, therefore, punishable under Section 193 of the Penal Code.

Markby, J.—I am of opinion that a conviction in the form in which this prisoner has been convicted upon a charge in the same form is good in law.

It appears to me that this is a case to which the second Clause of Section 461 has no application. The offence of which the prisoner has been convicted is giving false evidence, and the Section of the Penal Code under which he has been convicted is Section 193. There is no necessity, therefore, for resorting to the alternative given in the second Clause of Section 461, and it need not be further considered.

Nor does it appear to me that Section 455 has any application either. There was not in this case "a single act or set of acts of such a nature that it was doubtful which of several offences the facts which could be proved would constitute." The facts which could be proved, even if they are to be treated as a single set of acts, could only constitute the offence of giving false evidence under Section 193, and no other.

The only question which it appears to me that we have to consider in this case is, whether a charge in this form is sufficient. If it is sufficient, then it appears to me to follow, as a matter of course, that a conviction which follows the words of the charge must be good also. And whatever might otherwise be my opinion in the matter, I think we are precluded from saying that this is not a good charge, seeing that it is in the very form given by the 3rd Schedule, and the Act provides (Section 442) that the charge may be in the form therein given.

It is said that the Legislature will thus, by the form in which they have drawn the charge, have altered the definition of the

offence of giving false evidence as given under the Penal Code, which was not their intention. I am not sure that this is the effect of what has been done. But even if it is so, the Legislature must, I think, be taken to have been aware, when they laid down these forms authoritatively, that the form in which a charge is laid does affect materially the evidence which is necessary to support it; and that, by changing the evidence, which is necessary to support a conviction for an offence, the nature of the offence itself may sometimes be changed. I think there could not be here any accidental omission or oversight. This form of charge must have been given to meet this very case. I think, therefore, I am bound to consider this to be a good charge, and to apply to it the usual rule which I understand to be this : that a charge is proved when all the material averments in it are proved. Here the finding is that all the averments *are* true, and a conviction in these terms is certainly a good conviction, though I should have thought it equally good if it had merely been that the prisoner was guilty of giving false evidence, as that would have been equivalent to a finding that the charge, as laid, was proved.

Phear, J.—The matter before us entirely depends upon the right construction to be placed upon certain portions of the existing Criminal Procedure Code; and if, in considering the question which has been put to us in this reference, we were restricted from travelling beyond the limits of the actual text of that Code, I think I should be led, without difficulty, to the opinion that the verdict of the Jury ought not merely to find that the one or the other branch of the alternative charge made against the prisoner in the present case is true, but ought to specify which of the two branches is true.

The charge is a statement, express and implied (Sections 439, 440), of the facts which the prosecution undertakes to establish by evidence against the accused, and several Sections of the Code are directed to enacting that it shall generally be precise, single, and unambiguous.

The prosecution may (with certain limitation), at one and the same trial, offer to the Jury several views of the facts, either of one, so to speak, criminal occurrence, or of several criminal occurrences, according to which views the prisoner's conduct in each occurrence amounts to the commission of a corresponding offence (Sections 452, 453, 454, 455). If these are several views of the *same* occurrence, then the offence varies with the Section, or part of a Section, within which the particular view brings it; if they are views of several occurrences, then the corresponding offences may fall within the same Section. And it is important, in reference to a Full Bench decision, which will be presently mentioned, to bear this distinction in mind.

These several views of the facts should generally be exhibited in a succession of distinct charges (Section 454), but (in the case, at any rate, of their being only alternative statements of one criminal occurrence) they may be put in the shape of an alternative charge (Section 455 explained by the illustration).

And whether alternative views of the facts of one criminal occurrence are exhibited in a series of charges, or in one alternative charge, if the *Court* is *doubtful* which is established by the evidence, it must expressly say so, and in that event will pass judgment in the alternative according to Section 72 of the Penal Code (para. 2, Section 461). In all other cases, it would seem, at least inferentially, the Court must pass judgment separately on the view of facts involved in each charge.

The duty of the Jury as a part of the Court is also, plainly, to decide which of the several views of facts presented to it for consideration by the prosecution is true (Section 257); and to say specifically as to the view of facts exhibited in each charge whether it is true or not (Section 263). There is no relief from this obligation to come to an express finding with regard to each alleged view or set of facts, except that which is, by implication, given in para. 2, Section 461, just referred to, and that paragraph applies, as it seems to me, only to cases where the several sets of facts are the alternative representations of one criminal occurrence.

But the alternative views of fact stated in the charge which is now under our consideration are not alternative views of one criminal occurrence; they represent two entirely distinct criminal occurrences; the one being to the effect that the accused, on the 23rd January 1873, at Alipore, in the course of a trial of two persons, on a charge of cheating, before Moulvie Abdool Luteef, stated in evidence, &c., which statement he, at the time of making it, knew to be false, &c.; the other, that the accused, on the 13th February 1873, in the course of the trial of these same two persons, together with a third person on the same charge, before the same Magistrate, stated in evidence, &c., which statement, &c.

And therefore, if the scope and spirit of Sections 455 and 461, para. 2, are that which I have above described, this case does not fall within either of them. In other words, there does not appear to be in the *text* of the Criminal Procedure Code any warrant for an alternative charge of this kind, or for an alternative finding of these two substantively different states (or views) of fact, whether exhibited in an alternative charge, or in two separate charges. Consequently, if the text alone of the Code were consulted, it would not, as I understand it, support the conviction which is before us.

And this is not a matter of mere technical regularity; it very closely touches upon the right and satisfactory administration of justice. Obviously, it might be of the greatest possible moment to the persons who were being tried before the Magistrate on the 23rd January and 13th February, that it should be distinctly established, in the case now before us, which of the two statements alleged to have been made by the present accused on those two days respecively was false. And, therefore, a procedure which would enable the prosecution in the present case to procure a conviction of the accused in the alternative, without troubling itself to go the length of establishing the falsehood of the one statement or the other, might work a serious grievance to those persons. Again, the present accused person himself, by an alternative conviction, is deprived of the advantage which he ought to have, in the event of a material witness to the falsity of one of the statements being convicted of perjury.

If, also, the prosecution is not under a legal obligation to establish the falsity of either statement, then it is plain that it may launch its case upon the bare evidence that the two alleged statements were respectively made, and then leave the prisoner to satisfy the Court as best he can that neither of them was false. This is the course which is most usually taken, and I do not hesitate to say that it is generally most unfair. The contradiction between the two statements is seldom absolute, though there is commonly enough opposition in them to lead a not over-scrutinizing Jury to presume it; and, the contradiction being arrived at, the falsity again is presumed in spite of anything which the prisoner may say in the dock. Convictions of this character are most unsatisfactory, and do very little to meet any real mischief. Yet the temptation to the public prosecutor to seek them is so great that, in this country, perjury is hardly ever attacked in any other way. Deliberate perjury persisted in is not often the subject of prosecution in the Mofussil Courts.

Several other considerations of public importance might be brought forward; but it seems to be sufficiently plain without more that perjury is the one offence of all others in the Penal Code which calls for precision and unambiguousness of statement in the charge and in the judicial finding.

Thus, it appears to me that the construction of the text of the Criminal Procedure Code, taken by itself, which I have arrived at, accords with the expediency of the matter; and that thereby its reasonableness is in some degree supported. However, when we pass on from the text of the Criminal Procedure Code to the forms of charges in Schedule No. III. appended to the Code, which are prescribed for adoption by Section 442, we find the last of them runs as follows :—

"That you, on or about the day of ,
"at , in the course of the
"inquiry into , before ,
"stated in evidence that ;
"and that you, on or about the ,
"day of , at ,
"in the course of the trial of ,
"before , stated in evidence
"that , one of which state-
"ments you either knew or believed to be
"false, or did not believe to be true, and
"thereby," &c.

Now, inasmuch as an alternative charge is only referable to Section 455, the fact that the Legislature has authorized this form seems to show that Section 455 was intended to extend, as it well may, beyond its illustration, that is to say, to the alternative allegation of different occurrences, at any rate, in the particular case which is covered by this form. And it has been argued from the form itself that the finding of the Jury and the judgment of the Court may, when such an alternative charge as this is preferred, be in the alternative. But Section 461, para. 2, certainly does not here apply, and it is difficult to see how the distinct provisions of Section 257 can be escaped.

The Full Bench ruling, which is reported in 6 W. R., Cr., 65, decided that, under the late Criminal Procedure Code, there might be an alternative finding as well in a case in which the evidence proves the commission of one of two offences falling within the same Section of the Penal Code, and it is doubtful which of such offences has been

proved, as in one in which the evidence proves the commission of an offence falling within one of two Sections of the Penal Code, and it is doubtful which of two Sections is applicable. This ruling, if it could be adopted now, would, therefore, support the finding in the present case. The reasoning, however, by which it was arrived at, depended upon two Sections of the old Code, which are not present in the new Code. The first of these Sections was Section 242, which, so far as it is now necessary to quote it, ran thus: "When "it appears to the Magistrate that the facts "which can be established in evidence show "the commission of one of two or more "offences falling within the same Section of "the said Code, but it is doubtful which of "such offences will be proved, the charge "shall contain two or more heads charging "each of such offences." This was held to justify the framing a charge containing two heads, apparently similar in substance to that which is under our consideration. And although this Section 242 of the old Code is not repeated in the new Code, its substitute being the present Section 455, yet, so far as concerns the case before us, the double-headed charge may be said to be justified by the last form of Schedule III. Thus, we are, under the existing Code as well as under the old, carried over the first step towards the Full Bench conclusion. And the double-headed charge of two offences having been in this way arrived at, the Full Bench made its second step upon the footing of Section 382, Clause 5, which authorized the Jury to find in the alternative upon a double-headed charge. But there is no equivalent to this in the present Code. The Jury are now bound to find which view of the facts is true (Section 257), subject only, as before mentioned, to such qualification as is to be found in Section 461, para. 2, which appears to be purposely so framed as to exclude an alternative finding of two offences falling under the same undivided Section of the Penal Code. It is carefully worded, so as to cover the cases belonging to the first part of the old Section 242, but omits those of the second part, among which the Full Bench case and the present case come.

It was thrown out during the argument in this case that the "view of the facts," with regard to which the Jury are, by Section 257, called upon to decide whether it is true or not, is, in a double-headed charge, the (so to speak) *entire* alternative view expressed in the charge. But this does not accord with the natural meaning of the words. An alternative charge of the kind, for which this construction of the sentence is especially wanted, puts forward *two* views of the facts which are inconsistent with each other, and which might, if the prosecution had so chosen, been made the subject of a separate charge; either the accused told the truth on the first occasion and falsehood on the second, or *vice versâ*. It has been said that the prosecution, by alleging in the charge that the accused stated *this* on the first occasion, and stated *that* on the second, and that one of these two statements was false, presents but one view of the facts to the Jury; but it appears to me plain that this is not correct. The true effect of the charge is to put forward in a concise form at least two perfectly distinct views of facts, always inconsistent with each other, in those cases for which the ambiguous conviction is most zealously demanded, namely, in those cases where it is assumed to be patent on the face of the two statements that, if either one of them is true, the other must be false. And the very reason for thus putting forward two views is, that the prosecution cannot venture to assert which view is true. When, then, the Legislature says that it is the duty of the Jury to *decide* which view of the facts is true, it can hardly mean that, in the event of two inconsistent views being in this way simultaneously offered to the Jury, with the implied admission on the part of the prosecution that it cannot say which is true, it is enough if the Jury finds that either the one or the other is true. Moreover, if the authorization of a double-headed or alternative charge, by the force of implication alone, authorized a general finding on the evidence that such a charge was made out in one or other of its branches, then it is difficult to see why the express provisions of Section 461, para. 2, were enacted in reference to one class only of double-headed or multi-form-headed charges; for they could hardly have been intended merely to introduce Section 72 of the Penal Code into the Civil Procedure Code. Plainly, by the spirit of Section 455, if not by its words, charges which might, under its provisions, be put in the alternative, but which are nevertheless left to stand separately, may be dealt with by the Court as if they had been presented in the alternative; and if it is a consequence of an alternative charge, that the Court is relieved from the obligation to find which head of it is true, then it seems to follow that Section 461, paragraph 2, is partial and superfluous.

At first, I was disposed to think that the Legislature, by introducing into Schedule III. the alternative form applicable to the present case, indirectly, if not expressly, intimated its acceptance of the Full Bench ruling reported in 6 W. R., Cr., 65, and virtually incorporated the law enunciated by it in the new Act; and this would probably have been so, if the new Act did not substantially differ from the old Act in the particulars which furnished the foundation for the Full Bench decision. But I have already pointed out that these particulars are absent from the new Act. The reasoning by which the late Chief Justice arrived at the conclusion in that case could not be supported upon the basis of the present Act. It appearing, then, that the Legislature, when passing the new Act, entirely removed the foundation on which the ruling of the Full Bench was placed, we cannot safely infer from the introduction of the alternative form of charge alone, which answered at most to the first part only of that ruling, that the entire ruling was intended to be enacted.

On the whole, then, though, I admit, not without great hesitation, I have reached the opinion that, under the existing Criminal Procedure Code, while, no doubt, an accused person may be lawfully tried upon an alternative or double-headed charge, such as that which is brought before us in this reference, still the Court or Jury must, for a conviction, find specifically which branch of the alternative or head of charge is true.

Jackson, J.—Having given to the very important question raised in this case the best consideration in my power, I come to the conclusion, to which I first inclined, that the finding and conviction are insufficient.

No one can feel a stronger respect than I do for the opinion of Sir Barnes Peacock in such a matter as this, and no one can be more averse to disturbing settled rules of law, but I feel it, for reasons which I shall state in the sequel, to be a duty still more imperative than that of respecting decisions, to express my dissent from a ruling which, I think, in effect adds to the Penal Code an offence not defined by the Legislature.

It seems to me that neither Section 242 of the repealed Code, nor Section 455 of the present Code of Criminal Procedure (apart from the form in Schedule III., to which I shall presently advert), warranted the exhibition of a charge like that before us, and my persuasion is yet stronger that nothing, at all events in the existing Code, which is the material question, justifies a finding and conviction in such terms.

It is not requisite now that I should give at any length my reasons for dissenting from the Full Bench decision which is based upon repealed enactments, but I may say that, while I admit the latter clause of the old Section 242 to embrace charges of false evidence based upon statements, given at different times, contradictory of each other, I conceive the Legislature to have had in view in framing that Section the uncertainty as to *which of the offences would be proved*, and therefore to have contemplated the necessity of *proving* one or other statement to be false, and therefore to amount to an offence; and that it did not sanction the mere entangling of the accused in a logical snare from which, as a matter of reason, he could not escape. As far, moreover, as the words of the Code went, the charges would have, it seems to me, to be exhibited *seriatim*, and not alternatively.

But I find no provision in the Code of 1872 replacing the latter portion of Section 242. On the other hand, the Legislature, seeing, it may be, the dangerous ambiguity of that Clause, has recast the whole Section, and, dropping the last Clause entirely, has put the other into new words, which seem to admit of no misinterpretation; for while the charge, alternative as to fact, but identical as to offence, is excluded, the many-headed charge, arising when several distinct offences are comprised in one Section (as in Section 382, Indian Penal Code), is preserved in the Schedule. Section 452 provides "that there must be a separate charge for every distinct offence of which any person is accused, and every such charge must be tried separately, except in the cases hereinafter excepted." The only exceptions to this rule are contained in Sections 453 and 454, and I do not find that the present case falls within either of them. Further, Section 440 declares that "the charge shall contain such particulars as to the time and place of the alleged offence, and the person against whom it was committed, as are reasonably sufficient to give notice to the accused person of the matter with which he is charged." And Section 441 goes on to declare that, "when the nature of the case is such that the particulars mentioned in Sections 439 and 440 do not give sufficient notice to the accused person of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the offence was committed as will be sufficient for that purpose."

One of the illustrations to this Section (*c*) is to this effect: A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false. There is nothing in the text of the Criminal Procedure Code which qualifies these clear provisions in the case of perjury.

Giving false evidence in a stage of a judicial proceeding, by stating falsely before the Magistrate, &c., &c., is a distinct offence.

Giving false evidence in a stage of a judicial proceeding, by stating falsely before the Court of Session, is also a distinct offence. Would it be a compliance with the Sections I have quoted to put these distinct offences into one charge, and to allege that A had either given false evidence at a certain time and place against X by saying so and so, or given false evidence at a certain other time and place against the Queen, by saying something else?

I think it would not. But we are told that a charge, if not in accordance with these Sections, is expressly authorized by the 3rd Schedule, which, no doubt, may be read as part of Section 442, having been removed to the end of the Act merely for the sake of convenience to avoid interruption of the sense. The Section says: "The charge may be in the form given in the 3rd Schedule to this Act, or to the like effect;" and, where a form so given seems to be directly at variance with precise rules contained in the Code itself, I prefer to stand by the rules.

But the composition of the Schedule, and, in particular, the place allotted to this very form of charge, with the wording of it, appears to me to indicate that it has suffered from one of the inadvertencies almost unavoidable in the preparation of so long and intricate an Act. The 3rd Schedule is divided into two parts:—

I. Charges with one head.

II. Charges with two or more heads.

On the first I need not observe.

The second is framed to answer the purposes of Section 455 in the same way that Section 243 of the repealed Code was subservient to Section 242.

But, while those two Sections used in common the expression "heads of charge," it is disused in Section 455 ("in the alternative" being employed instead), and appears only in the Schedule, where, on the other hand, the term "alternative" does not appear, except to denote the peculiar form under Section 193, Indian Penal Code, which, however, is a matter quite different from what is spoken of as alternative in Section 455.

And, curiously enough, the Schedule gives no form of charge upon the most obvious and usual alternative case, *viz.*, that of doubt between the offence of theft and that of criminal breach of trust.

On the other hand, a variety of charges with more than one head are supplied, which have been rendered useless by Sections 456 and 457. For instance, why need a Magistrate now draw up several heads of charge against an accused for murder, culpable homicide, grievous hurt, and so forth, when, upon a charge of a murder or of culpable homicide, a conviction for any offence of the same nature, but inferior in degree, may follow?

The form called "alternative charges in Section 193" comes also into this division, though it is not a charge with several heads at all, but something entirely distinct, and, as I think, not warranted by any Section of the Code at all.

I pause here to remark that the old Code provided forms of conviction. The present Code does not; and while the old Code, setting out forms of charge with several heads for doubtful cases, provided alternative forms of conviction, the new Code gives in the Schedule several many-headed charges and one alternative charge.

Having said this, I return to the wording of this charge.

It does not run—That you, on or about the , intentionally gave false evidence, by stating ,
and thereby committed ,
or that you, on or about , intentionally gave ,
and thereby committed ;
but "That you, on or about the ,
stated in evidence ,
and on or about , stated ,
one of which statements you either knew or believed to be false, &c., and *thereby* committed an offence."

That is to say, the offence is made to consist of having made first the one statement, afterwards the other, one of them being false, though the Magistrate has not been able to determine, perhaps not taken the trouble to inquire, which.

Now, besides that the offence here stated is not that defined by the Penal Code, and required to be set out by the Criminal Procedure Code, namely, the intentional making of a particular false statement, but simply the making of two statements at different

times, one or other of them being known to be false, it will be observed that, so far as this form of charge goes, the two statements need not be contradictory one of the other. Also that, in fact, the two statements, though contradictory, may *both* be false, and not one only. As for instance, if the witness swore on the preliminary enquiry that he had seen the accused, without provocation, strike the deceased a blow with a club—such statement being prompted by enmity; and afterwards, on the trial, swore that he had not seen the accused strike the deceased at all—this latter statement being brought about by the receipt of a large bribe—the fact being that the witness had seen the accused, when irritated by the foulest insult, strike the deceased a blow with his fist, which blow, contrary to probability, produced death.

It appears to me, therefore, that the form in question is neither consistent with the positive provisions of the Code as to charges, nor sufficient for the purposes which it seems to contemplate.

One may, indeed, suspect that it was framed to meet, not the definition of any offence as contained in the Penal Code, but either the ruling of the Full Bench in VI. W. R., or the exposition of the law of perjury promulgated by the Nizamut Adawlut in their Circular Orders No. 126 of Vol. III. and No. 10 of Vol. IV.

In the first-mentioned Circular Order that Court directed (overruling a previous reported decision of two Judges, of whom one was the illustrious Colebrooke) that, where a prisoner was arraigned for perjury on two contradictory statements, it would not be necessary to prove the falsity of either.

In the second Circular Order, they prescribed a form of charge which, at all events, had the merit of being exact and complete according to the views which the Court at that time entertained.

It may be observed that the establishment of perjury by contradictory statements is taken from the Mohammedan law, as expounded by the law-officers of the Sudder Court in an elaborate opinion printed in No. 656 of the Constructions (the passage will be found at page 21 of the second volume, 4th Edition).

The Sudder Judges, however, in adopting it, annexed to it an important qualification, *viz.*, that the contradiction should be on a point material to the issue of the case. This restriction, in accordance with the present law as to giving false evidence, would be, and is, held unnecessary, so that the charge before us is going beyond Sudder practice, and is, in fact, pure Mohammedan law of the Mooftees.

We are not concerned at present with the enquiry whether the law should be so, but have only to consider whether it is so or not.

I have hitherto discussed the matter with reference to the charge, and I now turn to the conviction, upon which I found arguments which appear to me conclusive of the matter.

In the first place, it may be well to state what, in my view, according to the Code of Criminal Procedure, is the bearing which the charge has upon the conviction.

The charge I take to be, first, a notice to the prisoner of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him, and of which he will have to clear himself; second, it is an information to the Court, which is to try the accused, of the matters to which evidence is to be directed, and by the forms and illustrations provided, the Legislature, no doubt, indicates what in certain instances it deems to be a sufficient compliance with the rules which it has laid down.

Thus, it may be that the framers of the law intended to furnish, in reference to Section 193 of the Penal Code, a convenient and suitable form in which an accusation founded on contradictory and, probably, false statements might be exhibited, though it seems to me that the intention has not been successfully carried out.

But precise and positive rules apply to the conviction, and a judgment of conviction, not in conformity with those rules, is bad in law.

Section 461 declares that the judgment, if the accused person be convicted, shall distinctly specify the offence of which, and the Section of the Indian Penal Code under which, he is convicted; or, if it be doubtful under which of two Sections, or under which of two parts of the same Section, such offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.

The accused cannot be convicted of matter not contained in the charge, except as provided in Sections 456 and 457; but, however loosely the charge may have been framed, the conviction must be precise except in the particular cases, now very accurately defined, where the law allows an alternative judgment.

If the trial in a Court of Session is held with the aid of assessors, the Judge, with

whom the decision rests, must record "the point or points for determination, the finding thereupon, and the reasons for the finding" (Section 464).

If the trial is by Jury, a partition of functions takes place, and it is the duty, not of the Court, but of the Jury, "to decide which view of the facts is true" (Section 57); and it must appear in the Judge's record of the heads of his charge to them that the proper point or points for determination have been laid before the Jury.

And, therefore, I think it clear that, when the prisoner is charged with having given false evidence in making this statement or that, the finding must be express:—

1st.—Because an alternative finding will not satisfy the requirements of Section 461.

2nd.—Because there is no other warrant for any kind of alternative finding.

3rd.—Because a bare finding that he has given false evidence will not suffice, for the definition of false evidence in Section 191, Indian Penal Code, demands the making of some statement which is false, and by Section 441, Code of Criminal Procedure, Illustration (*c*), the particular statement must be set out, whereas the Jury here has not found that either statement is false.

4th.—If it be a question raised in the charge which of the two contradictory statements is false (if only one be charged as false), then it would seem that the Jury, as having the duty of deciding which view of the facts is true, must find that this or that statement is proved to be false, or that both are found, or that neither is found, to be false.

And it seems to me highly inexpedient that an ambiguous verdict of the kind contended for should be permissible, for it is obvious that the degree of criminality involved in such a charge may vary almost infinitely; for, as already observed, the more venial or the more wicked of the two statements, or both, might have been false, and one of the many consequences would be that, from the uncertainty of the facts found, the Appellate Court would be quite unable often to exercise any control, or even express an opinion, as to the measure of punishment which was proper in the case. Other embarrassments and other unsatisfactory results might ensue.

If, for instance, one of the false statements charged had been in support of a charge of murder, the accused, if he were convicted, might, in a certain case, be punished with death under Section 194.

Could the Court which tried him tack on to an alternative as to fact, a second alternative as to offence, and say that he had either given false evidence for which he might be hanged under that Section, or given some other false evidence by which he could be imprisoned only under Section 193; and although, if this could be done, the Court would be bound, under Section 72, Indian Penal Code, to award the lighter punishment, would it be desirable, would justice be satisfied, if so momentous an issue were left undetermined as to whether the prisoner had or had not given false evidence with intention, and had thereby caused an innocent person to be convicted and executed in consequence of his false evidence?

Nor does the question apply only to the case of false evidence; at least one other instance occurs to me, in which, if the arguments for the Crown be well founded, analogy would authorize an alternative finding. I mean the offence of bigamy.

There is a case cited in 1 Hale 693 (page 692, Edition of 1800), called the Lady Madison's case: A married B, and afterwards, during B's life, married C. B then dying, but in the lifetime of C, A married D. This marriage of A with D was not bigamy, because, B living, the marriage to C was void.

Now, let us suppose that, in this case, the evidence left it in doubt whether B had been living at the time of A's marriage with C, could A have been charged alternatively with having committed bigamy either with C or with D, for, if B was then living, the marriage with C would be bigamy; but, if he was dead, then the marriage with C would be good, and the marriage with D bigamy, and could she be convicted on such alternative charge?

I conclude, therefore, that the conviction in this case is not sustainable, and I would order the appellant to be discharged.

The contrary, no doubt, was held seven years ago by a Full Bench of this Court. The precedent has been followed, though, it has always appeared to me, unwillingly by the Division Benches, and there is this further reason for adhering to it now that the ruling has been adopted by the High Court of Madras.

But this does not bind my conscience.

The Courts are bound to solve, to the best of their ability, questions of law which arise in the course of their business; and if these questions relate to civil rights or obligations, and the rule becomes settled, persons begin to shape their conduct thereby, and numerous titles are founded thereupon, and the mischief

of unsettling titles far outweighs the benefit of securing scientific accuracy of decision.

If scores of men, however, have been improperly convicted and punished on erroneous views of the law, that is not, in my opinion, a good reason for proceeding to convict and punish others on the same view.

The Courts are not empowered to inflict penalties for that which the law has not constituted an offence, nor are Courts, which are subject to a Code of Procedure, in cases provided for by that Code, authorized to act otherwise than in accordance with the procedure enjoined.

The Legislature might, of course, if it thought fit, prescribe a punishment for contradictory statements, material or otherwise, made before a Court of Justice, as an impediment in the way of justice, though whether in so doing an equally serious mischief might not be done by, as it were, constraining men through fear of certain punishment to cleave to false statements once made, may be worth considering.

And if the occurrence of this case should have the effect of bringing about an authoritative declaration by the Legislature, one way or the other, I shall not regret having brought the matter under the serious attention of my colleagues.

Couch, C. J.—The charge in this case against the accused was first that he did, on or about the 23rd of January 1873, at Alipore, in the course of the trial of Toolsee Dass Dutt and Mahomed Luteef on a charge of cheating, state in evidence before Moulvie Abdool Luteef, the Deputy Magistrate of Alipore, that "the greater part of the furnitures were sent by me to that house (*viz.*, the house at Chitpore), and a small portion by Belillos and Zuhoorooddeen;" and that he did, on or about the 13th of February 1873, at Alipore, in the course of the trial of J. R. Belilios, Toolsee Dass Dutt, and Mahomed Luteef, in the same case of cheating, state in evidence before Moulvie Abdool Luteef, Deputy Magistrate of Alipore, that "Belilios never sent furniture of his own, or any furniture of his own or of any one else, to that house (*viz.*, the house at Chitpore), nor was any of the furnitures in that house belonging to Belilios," one of which statements he either knew or believed to be false, or did not believe to be true, and that he had thereby committed an offence punishable under Section 193 of the Indian Penal Code.

The second charge is similarly framed, and states that the accused gave evidence on the 23rd of January 1873 and the 13th of February 1873, at Alipore, and that he either knew or believed one of the statements to be false, or did not believe it to be true.

It is material to notice that the charge does not allege that the statement made on the 23rd of January 1873 was known or believed to be false, or not believed to be true. Nor does it allege that the statement made on the 13th of February 1873 was known or believed to be false, or not believed to be true. It merely alleges that one of the two statements set out in it was known or believed to be false by the accused, or not believed by him to be true.

Upon this charge he was tried, and in the summing-up of the Judge, the Jury were told, and very properly: "Before you can find him guilty, you must be satisfied that he made one or other of the statements contained in the charge, knowing that such statement was false, and deliberately intending to make a false statement." The majority of the Jury found that the accused was guilty of the offence specified in the first and second heads of charge—the offence specified being an offence punishable under Section 193 of the Penal Code.

After such a summing-up, calling the attention of the Jury so plainly to the necessity of their being satisfied that one or other of the statements was known to be false, and that the accused deliberately intended to make a false statement, I think there can be no doubt that the offence of giving false evidence within the meaning of Section 191 of the Penal Code was committed on one or other of the occasions specified in the charge. Then it appears to me that the only question is, was it necessary, in order to make the conviction legal, that the Jury should find on which of the two occasions the offence was committed? Does the law in this country render that essential to a conviction for giving false evidence?

The 439th Section of the Code of Criminal Procedure now in force requires that the charge shall state the offence with which the accused person is charged, and the 440th that the charge shall contain such particulars as to the time and place of the alleged offence, and the person against whom it was committed, as are reasonably sufficient to give notice to the accused person of the matter with which he is charged. The charge in this case does that. It states what the offence is, namely, that the accused committed an offence punishable under Section 193 of the Penal Code, and it contains such particulars as to the time and place as

give sufficient notice to the accused of what he is charged with. He is told that, by making the two statements, one of which it is alleged he knew or believed to be false, or did not believe to be true, he committed an offence punishable under Section 193.

Section 442 says that the charge may be in the form given in the 3rd Schedule to the Act. In that Schedule, there is such a form of charge as was made against the accused in this case, and it appears to me that, unless a conviction upon a charge so framed is allowed by law to be valid, the putting this form of charge in the Schedule was not only useless, but is also inconsistent with saying that the Jury is required by the law to find and to state upon which of the two occasions mentioned in the charge the false evidence was given. If the Jury is required to state that, then two charges in the form No. 10 in the Schedule would be proper. One would state that evidence was given on the 23rd of January 1873, which the accused either knew or believed to be false, and the other would state that evidence was given on the 13th of February 1873, which the accused either knew or believed to be false. If it is required by the law that the Jury or the Court, where the trial is with assessors, should find distinctly on which of the occasions the false statement was made, the alternative charge given in the Schedule is perfectly useless.

Again, if it is necessary for the Jury, in order that the conviction shall be valid, to say which of the two statements is the false one, it is requiring the Jury to find what is not alleged in the charge. All that the charge alleges is, that one of the statements was known or believed to be false, or not believed to be true, and that thereby the offence was committed. Such a charge being authorized by the law, it appears to me that all which the Court has to find to sustain a conviction for giving false evidence is, that the allegations in it are proved.

In considering what the intention of the Legislature was in making these provisions in the new Code of Criminal Procedure, and giving in the Schedule this form of charge, I think it is important to see what, at the time this Act was passed, was the acknowledged state of the law. It had been decided by a Full Bench of this Court that a conviction upon a charge of this description was legal. That view of the law had been acted upon undoubtedly for some years in this Presidency. In Madras, as appears from the case reported in 4 Madras High Court Reports, p. 51, the same view of the law was adopted, and it cannot be doubted that this decision was acted upon in that Presidency. We have no reported case in the Bombay High Court, and I do not desire to speak merely from memory as to what was the practice in that Presidency. But in Madras and in Calcutta, and my belief is in Bombay also, the law was considered, at the time this Act was passed, to be that a conviction of a person who was found to have intentionally made contradictory statements on oath or solemn affirmation was legal. I cannot think that the Legislature intended, by the way in which the new Code has been drawn, by the omission of certain Sections which are in the old Code, and the substitution of others which probably were supposed to be an improvement in the wording or arrangement of it, to alter the law as to the offence of giving false evidence. That this charge, although called an alternative charge, and, being so far alternative that two statements are set out in it when one offence only is alleged, namely, that the accused thereby, that is, by making statements one of which he knew or believed to be false, committed the offence, should be considered as a charge of but one offence, and was to be dealt with by the Jury as such, I think is shown by Section 452, which says that there shall be a separate charge for every offence.

It was argued that it would prejudice the accused in respect of his subsequently pleading an acquittal or a conviction, if a conviction were allowed upon a charge framed as this is, and that he might be tried again for making one or other of the statements, which are the subject of the present charge. Section 460 provides for a person who has once been tried for an offence and convicted or acquitted of such offence, not being liable to be tried again on the same facts for the same offence, nor for any other offence for which a different charge from the one made against him might have been made under Section 455, or for which he might have been convicted under Section 456.

If the question should ever come before me, what is the effect of a conviction or an acquittal upon such a charge as this, I should hold that the accused could not be tried again for giving the evidence on either occasion, which is set out in the charge, for then

he would be tried again on at least a part of the same facts as he had been tried upon before.

I concur with my learned brethren in thinking that the second part of Section 461 does not apply to this case. This is a charge of but one offence, and the conviction is a conviction of that offence, and need not specify more than the offence of which the person accused is convicted. Here the Jury found upon the facts proved before them that the accused committed an offence punishable under Section 193. It appears to me that this finding is a good finding; nor do I see that Section 257 as to the duties of the Jury interferes with it, or prevents the finding being as it is.

Section 257 says that it is the duty of the Jury to decide which view of the facts is true, and then to return the verdict which, under such view, ought, according to the direction of the Judge, to be returned. I understand this to mean that it is the duty of the Jury to find whether the view of the facts that the accused made the two statements, that they were such that they could not both be true, and that he knew or believed one of them to be false, is true. I do not understand it as meaning that the Jury have to select from a part of the charge some of the facts, and say whether they are true. What is meant is the whole view of the facts alleged against the accused, the view taken by the prosecution which leads to the conclusion of his guilt, or the view which is set up on his behalf, and which would make him innocent; I do not feel at all pressed by the provisions of Section 257.

It appears to me that this was a charge authorized by the law, and that the allegations in it, which are sufficient to support a conviction, have been found by the Jury to be proved. If it is a good charge, nothing more is necessary to be found by the Jury than that the allegations contained in it are true. I cannot say that it is an illegal charge, finding it, as I do, deliberately allowed by the Legislature, and inserted in the Schedule which is referred to in Section 442.

I think, therefore, that the conviction is a good one.

I have to mention that two learned Judges not now present, Mr. Justice Glover and Mr. Justice Pontifex, are also of opinion that the conviction is good.

Kemp, J.—I concur.

The 15th April 1874.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Procedure—Nuisance—Obstruction—Public servant—Disobedience of order—Act XLV. of 1860, Section 188—Act X. of 1872, Sections 521, 525, 528.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Rajshahye.

The Queen

versus

Brojendro Lall and others.

An order by a Magistrate under Section 521, Act X. of 1872, for the removal of a nuisance does not become absolute until an opportunity is given to the persons affected by it to show cause why the order should not be carried into effect.

No order can be made under Section 528 of the Code, unless there is imminent danger or fear of injury of a serious kind to the public involved in the case; and where a Magistrate, who had made an order under Section 521, subsequently directed further enquiry to be made, it was held that he must be considered to have abandoned his proceedings under Section 528, and that he should have proceeded under Section 525, instead of fining the party charged under Section 188 of the Penal Code.

Reference.—On the 23rd August 1873, on the complaint of Baboo Shah that a road leading to Pershadpore hât had been closed by means of boughs of trees, &c., by Brijo Lall Goopto and Guru Churn Lahori, servants of Soorut Soonderee Debya, the Magistrate of the District passed the following order:—

"Ordered, under Section 521, that Naib Brijo Lall Goopto and Guru Churn Lahori do, within two days of receipt of this order, remove the obstruction complained of. Under Section 528, I direct that the obstruction be removed, whether application is made for a Jury or not."

This order was conveyed to Brijo Lall Goopto, and nothing particular appears to have been done in the case till the 4th September, when Brijo Lall and Guru Churn presented a petition to the Magistrate, in which they declared the petition originally presented to be false, and prayed that an investigation might be made by the police, and proof of the facts taken.

Hereupon the Magistrate passed the following order: "Made over to Mr. Ward for enquiry and disposal. If a road to the rival hât has been closed, on which the public or persons lawfully employed had a right to travel, it should be opened out again at once."

On the 11th September, the Joint Magistrate, Mr. Ward, called on the police to report whether the Magistrate's order for the removal of the obstruction complained of has now been carried out or not.

On the 4th October, the police reported that the road or path which had previously existed had been cleared, so as to make it passable for men in accordance with orders, but that afterwards *kolay* and *til* had been sown in places which obstructed the passage of hackeries.

On the 11th October, the police were ordered to take steps to have the road made passable for hackeries, and to send in the parties who had disobeyed the order.

On the 18th of October, the Joint Magistrate, on an application being made to stay the order, recorded that he saw no reason for modifying the Magistrate's orders of the 23rd August and the 4th September. He, therefore, rejected the application, made his order of the 11th October absolute, and proceeded against the parties under Section 188.

On the 13th of November, the Joint Magistrate, on an appeal being made to this Court, was directed to stay proceedings in the Section 188 case pending decision of the appeal.

He failed to comply with the order, and, after convicting one of the accused, on the 14th of November, finally punished the other on the 21st November.

For this disregard of the orders of this Court, the Joint Magistrate has been censured.

It appears to me that the proceedings of the Joint Magistrate were irregular, and his conviction of the two accused under the circumstances illegal.

The order of the Magistrate of 23rd August passed under Sections 521 and 528 was a legal order; and if proceedings under Section 188 had been taken against the parties, who either did not comply with it, or only complied with it partially, no objection to the proceedings on the score of illegality could have been taken.

But when the Magistrate, on the 4th September, when the parties petitioned that the matter should be enquired into, not only took no notice of the petitioners having failed to comply, either partially or wholly, with his order of 23rd August, but made the petition over to the Joint Magistrate *for enquiry and disposal*, it appears to me that he, by his latter order, in reality, granted, and meant to grant, to the parties an opportunity of showing cause against the order. The enquiry which he meant to be conducted was not simply an enquiry from the police whether his order of 23rd August had been carried out, but an enquiry, either by the police or otherwise, into the facts alleged in the petition, and a disposal of the case after proper enquiry into these facts had been made.

In fact, the Magistrate practically abandoned his position under Section 528, and from the date of his order of 4th September, the case should have proceeded under Section 525, *i.e.*, the parties who had appeared to show cause should have been allowed to show cause, and evidence ought, under the imperative language of the Section, to have been recorded.

Instead of this procedure being adopted, however, the Joint Magistrate simply enquired from the police whether the order of 23rd August had been carried out, and, on learning that it had been partially complied with, directed that it should be fully carried out, and then proceeded to convict the parties, who had not been allowed to show cause, under Section 188; convicting them, although his proceedings had been stayed.

Under such circumstances, it appears to me that the proceedings of the Joint Magistrate are bad in law, and cannot be sustained. I therefore direct that the records of this case, along with the proceedings under Section 188, be submitted to the High Court, with a recommendation that the proceedings, including those under Section 188, of the Joint Magistrate, after the 4th September, be quashed, and that he be directed to proceed to the enquiry and disposal of the case under Section 525.

Judgment of the High Court.

Kemp, J.—I am of opinion that the order of the Joint Magistrate in this case under Section 188 must be set aside, as recommended by the Sessions Judge. It appears that certain parties petitioned the Magistrate, to the effect that Kinoo Mundle and others, by orders of two naibs of Ranee Soorut Soonderee, a zemindar, had put up branches of trees and plantain-trees on a public thoroughfare, which obstructed that thoroughfare, and that the object of doing this was to prevent parties coming to a rival hât, which had been lately set up. The Magistrate, under Section 521, was quite justified in issuing an order under that Section upon the evidence which he then took, but, under that Section, the order would not be absolute, except as provided in Section 528, until an opportunity

had been given to the persons affected by that order to show cause why that order ought not to be carried into effect. Now, under Section 528, the Magistrate may issue an order, when he considers that immediate measures are necessary to prevent imminent danger or injury of a serious kind to the public. Under such circumstances, he may issue an injunction on the person upon whom the notice under Section 521 has been issued, whether a Jury is to be, or has been, appointed or not. Now, this is not a case in which it can be said that the immediate measures contemplated by Section 528 were in any way necessary; there was no imminent danger or fear of injury of a serious kind to the public involved in the case. It may be that, if the Magistrate had done nothing intermediately between the order passed on the 23rd of August and the order fining certain parties under Section 188, this Court would not have been able to say that there had been any error in law in the proceedings of the Magistrate; but it appears that, subsequent to the order of the 23rd of August, the parties against whom the notice was issued, namely, the naibs of Ranee Soorut Soonderee, applied by a petition, stating that the application made in the first instance by the petitioners who had obtained an injunction was a false application, and they asked that there might be an inquiry; in short, it was an application to permit them to show cause under Section 521. If the Magistrate had rejected that petition, then, perhaps, his proceeding, although somewhat arbitrary, and not strictly in compliance with the provisions of Section 188 of the Penal Code, which requires that there must be a finding, not only of disobedience to an order by a public servant competent to pass that order, but that such disobedience is likely to cause, or tends to cause, obstruction, annoyance, or injury, might still have been upheld in spite of such omission; but I find that, on the petition of the naibs of the Ranee, the Magistrate himself, who passed the order of the 23rd of August, directed further enquiry to be made by the Joint Magistrate, who was to enquire into and dispose of the case, and the police were also called upon to enquire.

In the face of this enquiry, I think that the Magistrate must be held, as the Judge is of opinion, to have abandoned his proceedings under Section 528, and therefore the proceedings ought to have been held under Section 525; that is to say, the naibs of the Ranee ought to have had an opportunity of showing cause why the Magistrate's order should not be carried out, or to apply for a Jury within the time specified by law. I therefore quash the order of the Magistrate under Section 188, and direct that the fine, if paid, be refunded. The case will be sent back, and the Magistrate will proceed under Section 525, and dispose of the case under that Section, after giving the petitioners an opportunity of showing cause, and of applying for a Jury, if they deem it proper to do so.

The 17th April 1874.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

High Court—Jurisdiction—Procedure—Irregularity—Act X. of 1872, Sections 70, 283, 294, 297.

(Miscellaneous Case.)

Sonatun Dass and others, *Petitioners,*

versus

Gooroo Churn Dewan, *Opposite Party.*

The Advocate-General and *Baboos Kalee Mohun Dass, Doorga Mohun Dass,* and *Lall Mohun Dass* for the Petitioners.

Baboo Hem Chunder Banerjee for the Opposite Party.

The High Court declined, under Act X. of 1872, Section 70, to interfere with an order in a case under Section 530, in which the objection as to jurisdiction was not seriously taken in the Court below, and in which the petitioner failed in his application to the High Court to show that he had been in any way prejudiced.

Per Ainslie, J.—The power given to the High Court under Sections 294 and 297, Code of Criminal Procedure, of enquiring into the regularity of proceedings, and setting aside proceedings which are irregular, is a limited one, and is to be applied only in cases in which it appears that there had been a material error in such judicial proceedings; and in considering what a material error is, the Court is bound to be guided by the other parts of the Code, such as Sections 70, 283, and 297.

Kemp, J.—On the 30th August last, the record of this case was sent for, and a rule was issued, calling upon the opposite party to show cause why the order of the Deputy Magistrate of Madareepore (which Sub-Division is in the Backergunge District), dated the 30th of April 1873, should not be set aside as passed without jurisdiction. The party who obtained the rule was the first party in an enquiry under Section 530 of the Code of Criminal Procedure. In his kyfeuts on the record, which we have referred to, I do not find that he took any serious objection to the Deputy Magistrate of Backergunge taking up the case. He certainly says that the dispute was as

regards a towjee mahal of the Collectorate of Dacca, but it often happens that a mahal may be on the towjee of one Collectorate, and yet may be within the criminal jurisdiction of another district. But, be that as it may, he took no distinct objection to the Magistrate of Madareepore trying the case. Then the Deputy Magistrate went to the spot, and enquired into the case. He was of opinion that the property was within the limits of his jurisdiction, and decided the case against the first party. Then the first party comes up to this Court, and complains that the whole thing must be set aside, because the Deputy Magistrate had no jurisdiction. In his petition to this Court, he does not at all allege that he has been in any way prejudiced by the proceedings of the Deputy Magistrate. Section 70 of the Code of Criminal Procedure says that "no "sentence or order of any Criminal Court "shall be liable to be set aside, merely on "the ground that the investigation, inquiry, "or trial was held in a wrong district or "Sessions Division, unless it is proved or "appears that the accused person was "actually prejudiced in his defence by such "error, in which case a new trial may be "ordered."

I think that the petitioner in this case has not shown, nor has he even stated, that he has been prejudiced by the case having been enquired into by the Deputy Magistrate of Madareepore. We have been referred to Section 69, which enacts that, whenever any doubt arises as to the district in which any offence should be enquired into or tried, the High Court within whose jurisdiction the offender is apprehended may decide in which district the offence shall be enquired into or tried.

This is not a case in which this Section can apply. I am of opinion, with reference to the fact, that this objection was never taken seriously below, and also, considering that the petitioner has failed in his application to this Court to show that he has been in any way prejudiced, that the rule must be discharged.

Ainslie, J.—The Code of Criminal Procedure does not, except in Section 69, provide for the interference of the High Court to determine questions of local jurisdiction. Section 69 and the following Section, no doubt, as pointed out by the learned Advocate-General, expressly apply only to offences; and it is urged that Section 294 enables the Court to enquire into any matters which may not be offences, and satisfy itself of the regularity of the proceedings, and Section 297 gives this Court the power of setting aside proceedings which are irregular. That power is, however, a limited one, because it is to be applied only in cases in which it appears to the High Court that there has been a material error in a judicial proceeding in any Court subordinate to it. Now, I think, when we come to consider what a material error is, we are bound to be guided by the other parts of the Code. Here a power of interference, which is not expressly given by the Code, is claimed for the Court, and probably the Court has that power; but it seems to me that it is a power that has to be exercised under the same conditions as the powers expressly created by the words of other portions of the Code, and in the Sections which apply to quashing proceedings for error, namely, Sections 70, 283, 297, it will be seen that prejudice to one of the parties is a material point to be considered; and, therefore, it seems to me that we should be wrong if we were to hold that, under Section 297, this Court, in the exercise of a power not expressly given to it by the Code, ought to do that which it would not do in the exercise of the powers which are expressly given.

Taking this view of the case, it seems to me that we ought not to interfere on the petition before us, which does not allege any prejudice to the petitioner.

The 20th April 1874.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Procedure—Complaint—Dacoity—Unlawful assembly—Act XLV. of 1860, Sections 143, 395—Act X. of 1872, Sections 148 & 222, and Chapters XVII. & XVIII.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Rungpore.

Dwarkanath Mazoomdar (Defendant), *Petitioner,*

versus

Nalu Das (Complainant), *Opposite Party.*

Mr. R. T. Allan and *Baboo Tarinee Kanth Bhuttacharjee* for the Petitioner.

In this case the charge was originally one of dacoity under Section 395, Penal Code, and the proceedings were first conducted under Ch. XVIII. of the Code of Criminal

Procedure, but during the progress of the case the charge under Section 395 was lost sight of, and the accused were put on their defence on a charge of being members of an unlawful assembly under Section 143, Penal Code, and the proceedings were continued under Chapter XVII. of the Procedure Code in a summary way.

HELD that, had the complaint been one under Section 143, Penal Code, the Magistrate could, under Section 222, Code of Criminal Procedure, have tried it in a summary manner under Chapter XVII., but, as the complaint was of a charge of dacoity under Section 395, the Magistrate had no jurisdiction to try the case in a summary manner, but should have enquired into it in a regular manner under Chapter XVIII., Code of Criminal Procedure.

Reference.—THE case was decided by the Magistrate of Rungpore in a summary way under Chapter XVIII. of the Criminal Procedure Code, and there are necessarily no records of evidence. As far as I can make out from the papers sent to me, however, the circumstances of the case appear to be as follow: One Nalu laid a complaint to the District Superintendent of Police on 5th November 1872, charging 3 to 400 men with having committed dacoity, an offence under Section 395, Indian Penal Code, whereupon a police-investigation was ordered; and, when the Inspector set the enquiry on foot, the complainant, amongst other names, mentioned to him that of the petitioner Dwarkanath as having been concerned in the commission of the offence, but the Inspector seems to have been satisfied that there was no foundation for the complaint, in consequence whereof, by his report of the 8th December 1872, he reported the case as false. The report, however, does not appear to have given satisfaction to the Magistrate, who directed, by an order under date the 13th idem, to send up the accused in Form A—a form which is applicable only to cases which are found true and real.

This order seems to have been complied with. By a further order of the Magistrate, the police was also directed to send up the complainant to be examined. This, however, was not done till the 7th April 1873, when the examination of the complainant was taken, and reduced to writing. Subsequently, a warrant was issued for the arrest of the accused, and, on his not being found, a proclamation was issued, and his property attached, under Sections 171 and 172 of the Procedure Code. The accused then surrendered himself on the 17th December 1873, and was ordered to hajut, where he was kept above three weeks. As the complainant was not in attendance, the hearing was adjourned, and the police ordered to send in the complainant and his witnesses. On the police failing to carry out this order, they were again, on the 31st December 1873, directed to send the complainant and his witnesses in charge of a constable, and the hearing of the case was fixed for the 8th January 1874. They were, however, brought up before the Magistrate on the following day, when they were examined, but their depositions were not recorded. The accused was then put on his defence on a charge under Section 143, Indian Penal Code, and the charge under Section 395 seems totally to disappear from this stage of the case. The accused was summarily tried on the 9th February 1874, convicted of the offence under Section 143, and sentenced to two months' rigorous imprisonment. Now, it will be seen from the above that the trial, taken as a whole, was a mixture of a regular and a summary trial. From the beginning down to the moment when the witnesses were brought before the Magistrate, he appears to have dealt with the case as one for a regular trial. The examination of the complainant was taken down in writing, a warrant was issued in the first instance for the arrest of the accused, and, on his not being found, a proclamation was issued, and his property attached; and, when he at last made his appearance, he was committed to hajut. All these acts were clearly done in the course of a regular trial; but the moment the witnesses were brought up before the Magistrate, the trial changed shape, and the charge under Section 395 was completely forgotten or omitted without any reason being assigned. The evidence for the prosecution was taken in a summary way, without any record being made thereof. The Magistrate's proceeding was also, in my opinion, irregular and illegal on other grounds, which are noted below. In the first place, if the Magistrate was of opinion that the case pending before him was a summons-case (Section 148), the procedure adopted up to the time when the witnesses appeared to be examined, *viz.*, the issue of proclamation and attachment of property under Sections 171 and 172, was clearly unwarranted; for it cannot be supposed that the Legislature, in providing two different procedures for the two classes of cases called summons-cases and warrant-cases, intended that the procedure prescribed for one should also be applied to the other. In summons-cases, the procedure is always to be that prescribed therefor by the law. When the complainant, therefore, did not appear, the complaint should at once have been dismissed under Section 205; but, instead of doing so, the Magistrate exercised his discretion under the latter part of that Section in adjourning the case, without any

reasons shown for the appearance of the complainant and his witnesses, and sent for them through the agency of the police; and, as the latter having failed in the first instance to comply with the requisition, fresh orders were issued to them to send the complainant and his witnesses in charge of a constable. If, on the other hand, the Magistrate thought it to be a warrant-case, and the offence to be tried one under Section 395, he was clearly wrong in trying the case summarily under Chapter XVIII. of the Procedure Code. On a careful consideration, however, of the proceedings of this case, I am inclined to believe that from the first the Magistrate was of opinion that the offence charged was one under Section 395, and not one under Section 143; and therefore the trial should have been a regular trial throughout.

In the next place, I do not see how the Magistrate, after having dealt with the case for some time as one under Section 395, could, on the eve of examining the witnesses, determine that the case was one under Section 143, and, as such, that the provisions of Chapter XVIII. would apply. The provisions of Chapter XVIII. were clearly intended to be applied, if at all, from the beginning of a case, and not after it had proceeded to some extent. If, after consulting the complaint and the deposition of the complainant, the Magistrate finds that the case set up by these is a summons-case, and triable under Chapter XVIII., he may decide it summarily. If, on the other hand, a clear case of any offence not triable under that Chapter is shown to have been committed, he has no option but to proceed with the case as in a regular trial; for, until such a case is rebutted by the evidence, he has not the means of knowing that the offence was one to which summary trial might also apply. Here the case made out by the complaint and the deposition of the complainant was a dacoity-case. I think, therefore, the only course open to the Magistrate was to record the evidence for the prosecution as in a regular trial, and proceed with the case accordingly; and as he has not done this, the accused has, I think, been prejudiced by this failure on the part of the Magistrate. From these irregularities and errors in point of law, I think that the order of the Lower Court should be set aside, and have, therefore, the honour to report the proceedings for the orders of the Court.

In conclusion, I beg to state, for the information of the Court, that, as the accused has only been sentenced to two months' imprisonment, a fortnight of which he has already undergone, and as there will be necessarily some delay in receiving the Court's order in reply to this reference, I have thought it proper to direct the prisoner to be admitted to bail pending further orders.

Judgment of the High Court.

Kemp, J.—We think the proceedings of the Officiating Magistrate must be quashed. The complaint was not of an offence under Section 143. Had it been so, then, under the provisions of Section 222 of the Criminal Procedure Code, the Magistrate would have been competent to try the complaint in a summary manner, inasmuch as that Section authorizes the Magistrate to try summarily offences under the Sections therein referred to, and to dispose of them under Section 148 of the Criminal Procedure Code. Now, Section 143 of the Penal Code being one under which the punishment of imprisonment of either description for a period of six months, and of a fine, or both, may be inflicted, it comes within the purview of Section 148 of the Procedure Code; but in Section 148 it is enacted that, when a complaint is made before a Magistrate having jurisdiction in the case that any person has committed, or is suspected of having committed, any offence triable by such Magistrate, and so on. Now, the offence, as charged in the complaint in this case, is that the accused committed dacoity, and therefore the offence does not fall within the provisions of Section 148, and consequently the Magistrate had no jurisdiction to try the case in a summary way. The conviction and sentence must be quashed, and the case sent back to the Magistrate, who will enquire into it, and dispose of it in a regular manner.

List of holidays prescribed by the High Court for observance in the Subordinate Civil Courts.

CIVIL CIRCULAR ORDER No. 24A.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 29th December 1873.

(English Department.)

THE annexed list of holidays is to continue in force until further orders, and no annual lists will in future be published.

2. District Judges will, in each year, ascertain and fix for their own Courts and the Courts Subordinate to them the dates on which the prescribed holidays will fall.

3. Whenever a holiday of any kind falls on the same day with any other holiday, or on a Sunday, the common day alone is to be observed.

By order of the High Court,

(Sd.) H. J. S. COTTON,

Offg. Registrar.

The following list of days, to be observed as close holidays in the Subordinate Civil Courts, has been prepared, and is published, by the High Court of Judicature at Fort William in Bengal, as directed by Section 17 of Act VI. of 1871.

In the said list, the days printed in italics are to be observed only in the districts of Behar, and those printed in small capitals elsewhere than in Behar :—

HOLIDAYS.	NUMBER OF DAYS.
I.—Christian holidays, and holidays unconnected with religious observances.	
New Year's Day and the two days following	3
Good Friday and the day following	2
Queen's Birthday	1
Christmas Day and the two days following	3
II.—Hindoo holidays.	
Bussunt Punchomee	2
Sheeba Rat	2
Dole Jattra	2
Baronee Gunga Snan	1
Sreeram Nabomee	1
Mohabishub Sunkranti	1
Dusshora Gunga Snan	1
RUTH JATTRA	1
OOLTA RUTH	1
Junmostomee	2
JUGGUTDHATREE POOJA	2
Chutter Mela	6
KARTICK POOJA	2
III.—Mahomedan holidays.	
Eed-uz-zoha	2
Mohurrum	5
Akheri Char Shumba	1
Futtehi-dooz-dohum	1
Shubi Burrat	1
Eed-ul-fitr	2
IV.—The Dusserah Vacation.	
To commence from the Mohaloya, and end in the Bhratrideeya, *viz.*, Mohaloya, Doorga Pooja, Luckhi Pooja, Dewali or Kali Pooja, and Bhratrideeya	33

H. J. S. COTTON,
Offg. Registrar.

Issues instructions for the preparation of the Quarterly Statements A and B, and the Annual Statement No. 6.

CIVIL CIRCULAR ORDER No. 25.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 30th December 1873.

(English Department.)

HAVING reason to believe that some misapprehension exists as to the orders noted on the margin, in connection with the tripartite division of the headings of the Quarterly Statements A and B, and that of the Annual Statement No. 6, the Court is pleased to issue the following instructions on the subject.

Circular Order No. 31, dated 4th November 1870, paragraphs 4 and 5.
Circular order No. 32, dated 8th November 1870, paragraph 7.

2. In the Quarterly Statements submitted to the Court, as well as in the Annual Statement No. 6 (Civil), or "Statement showing the number and description of civil suits instituted in the Civil Courts of the district," &c., the headings "*Small Cause Court Class*" and "*Suits* for money, distinguishing suits up to Rs. 500 cognizable by Small Cause Courts from other cases," shall be taken to embrace all suits for money, comprehended within the sub-headings of that denomination in the Statement No. 6, whether, with reference to value or other limitations, cognizable by a Court of Small Causes or not; so that, in this respect, the Annual and Quarterly Statements may correspond.

3. The provisions of Circular Order No. 176 of the late Sudder Court, dated 10th April 1861, are, in other respects, to remain in force, and the explanations heretofore required in respect of particular classes of suits will continue to be submitted.

4. Again, in the Quarterly as well as in the Annual Statements, the description "Rent-suits" or "Rent-cases" will include all suits under the Rent Law, Act VIII. (B.C.) of 1869, which are arranged under the sub-headings specified in the prescribed form for that statement; but the instructions in regard to the speedy trial of suits, and the explanations in respect of cases pending over six weeks, relate only to suits for rent due and owing.

5. The heading "Other suits" will thus comprise the same denominations in the Annual No. 6, and in the Quarterly Statements.

By order of the High Court.

(Sd.) H. J. S. COTTON,

Offg. Registrar.

Circulates Resolution, declaring that pleaders enrolled under Act XX. of 1865 may hold the office of Sub-Registrar of Deeds.

No. 3037.

HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

The 13th December 1873.

RESOLUTION.

(English Department.)

Civil.

The question having been raised whether practising pleaders of the Courts of the interior shall be eligible to the appointment of Sub-Registrar of Deeds, the High Court are pleased to declare that pleaders of both the higher and lower grades admitted and enrolled under Act XX. of 1865 shall be allowed to hold the office of Sub-Registrar of Deeds without prejudice to their practice.

CIRCULAR MEMO. No. 21.

ORDERED that a copy of this Resolution be forwarded to all District Judges, with a request that they will watch and report, if any inconvenience appears to result from the office of Sub-Registrar being held by a pleader in active practice.

By order of the High Court,

(Sd.) H. J. S. COTTON,

Offg. Registrar.

Substitutes the Ras Poornima for the Dusshora Gunga Snan as a holiday in the Civil Courts of Orissa.

CIVIL CIRCULAR ORDER No. 1.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 14th January 1874.

(English Department.)

(*Civil.*)

In modification of the list of holidays prescribed by Circular Order No. 24A., dated 29th December 1873, the Court is pleased to direct that the Ras Poornima (one day) be substituted for the Dusshora Gunga Snan in the Civil Courts of Orissa.

Draws attention to the provisions of Act X. of 1872 in respect of the submission of Criminal Appeals.

CRIMINAL CIRCULAR ORDER No. 1.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 17th January 1874.

(English Department.)

(*Criminal.*)

The High Court find it necessary to call the attention of the several subordinate Criminal Courts, and of the officers in charge of jails, to the provisions of Act X. of 1872, in respect of the submission of criminal appeals. Section 275 of the present law enacts that "every petition of appeal shall be accompanied by a copy of the *judgment* or order appealed against." In cases tried by Jury, a copy of the Judge's charge to the Jury will take the place of the judgment or other order, and a copy of the judgment or other order, or of the Judge's charge to the Jury, as the case may be, is under Section 276 of the Code, to be furnished without delay on the application of any person affected by such sentence or order.

2. What the judgment or final order in the case shall contain is enacted in Section 464 of the Code: "The judgment or final order shall contain the point or points for determination, the finding thereupon, and the reasons for the finding."

3. No doubt can exist as to the plain requirements of the law in this matter, and the Court desire, accordingly, that the subordinate Courts will carefully comply with the provisions of the new Code, and discontinue the practice, which at present exists in several quarters, of furnishing to the person affected, and sending up to the Appellate Court, a copy of the sentence only with the petition of appeal.

Circulates revised headings to be adopted in the preparation of Annual Statement B 1.

CIRCULAR MEMO. No. 1.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 24th January 1874.

(English Department.)

(*Civil and Criminal.*)

In supersession of Circular Memo. No. 2, dated 26th February 1873,* the annexed revised list of headings is circulated for the guidance of all Civil and Criminal Courts, subject to the control of the High Court, to be adopted in the preparation of Judicial Statement (annual B 1), from and after 1st January 1873, when Act X. of 1872 came into operation.

List of Headings.

Magistrates of the third class exercising Criminal powers only { Paid. / Unpaid.

Magistrates of the third class exercising Criminal and Civil powers.

Magistrates of the third class exercising Criminal and Revenue powers.

Magistrates of the third class exercising Criminal, Civil, and Revenue powers.

Magistrates of the second class exercising Criminal powers only.

Magistrates of the second class exercising Criminal and Civil powers.

Magistrates of the second class exercising Criminal and Revenue powers.

Magistrates of the second class exercising Criminal, Civil, and Revenue powers.

Benches of Magistrates.

Magistrates of the first class exercising only Criminal powers.

Magistrates of the first class exercising also Revenue powers.

Magistrates of the first class exercising also Revenue and Civil powers.

Magistrates of Districts exercising only Criminal powers.

Magistrates of Districts exercising also Revenue powers.

Magistrates of Districts exercising also Revenue and Civil powers.

Magistrates exercising the powers described by Section 36, Act X. of 1872.

Courts of Session.

Moonsiffs exercising only Civil powers.

Moonsiffs exercising also Revenue powers.

Moonsiffs exercising also Criminal powers.

Moonsiffs exercising also Revenue and Criminal powers.

Small Cause Courts exercising no other functions.

Judges of Small Cause Courts exercising also ordinary Civil (or Revenue) powers.

Judges of Small Cause Courts exercising Criminal or Revenue as well as Civil powers.

Subordinate Judges without other functions.

Subordinate Judges exercising jurisdiction of Small Cause Court Judge.

District Judges.

Judicial Commissioners with powers of ditto.

* 19 W. R., Cirs., 9.

cels paras. 1 to 6 of Circular No. 31 of 4th ovember 1870, and prescribes revised forms Quarterly Statements A, B, and C.

CIVIL CIRCULAR ORDER No. 2.

m the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated he 26th January 1874.

(English Department.)

(*Civil.*)

Circular Order No. 31, ted 4th November 1870, ras. 1 to 6.

THE orders noted on the margin are hereby superseded, and the Quarterly Statements A, B, and C will henceforth be bmitted by the District Judges to the High ourt in the revised forms now circulated, ommencing, where they have not been eady adopted, with those for the 1st uarter of 1874.

2. Statements received in other than the rinted forms supplied by the Superintendent f Stationery will be returned, and the istrict will be dealt with as if no Statements had been received.

3. Statement A will contain the total number of original suits before each of the Civil Courts in the district during the quarter. The first column marked "Class of Courts" will contain the designation of each Civil Court in the district. Column 5 intended to show suits *received* "by institution" will include cases received *on remand* rom a higher Court, or admitted to *review:* but such cases should be noticed also in the column of remarks. It will be seen that in the other columns, the cases dealt with by transfer have been distinguished from other cases under both the general heads "Received" and "Disposed of," separate columns having been allotted to them, so that the figures in red ink prescribed by Circular Order No. 25, dated 12th August 1871,* will no longer be necessary. The instructions, however, contained in Circular Order No. 28, dated 12th October 1871,† as to the nature of the transfers intended, will apply to the new columns.

4. Part II. With reference to explanations of the cause of delay, District Judges will be guided by Circular Orders No. 6, dated 15th February 1873,‡ and No. 25, dated 30th December 1873.§

5. Statement B. Whenever the columns showing cases *received* "by transfer" under each of the several classes differ from the corresponding columns for cases *disposed of* "by transfer," an explanation of the discrepancy should be given in the column of remarks. When a case is remanded under section 351, Civil Procedure Code, it is to be treated as *decided* by the Appellate Court, disappearing from its original file, and should be accounted for as *disposed of by transfer;* but where an order is made under section 354, the case ought not to be removed from the file of the Appellate Court, but shown as *pending*. When a case is received by the Appellate Court under an order of the High Court in special appeal, it will be shown as *received* "by transfer," and, after disposal, will be shown as *disposed of* either by "final order" or "by transfer," according as it has been dealt with under section 354 or remanded to the original Court. Red ink figures need not be given.

6. Part II. The remarks already made in connection with Part II. of Statement A apply, *mutatis mutandis*, to Part II. of Statement B.

7. Statement C is intended to exhibit all miscellaneous cases instituted and disposed of by the various Judicial Courts in the district. All business heretofore entered in the Statements under the head of "Other Miscellaneous Proceedings," and which for the most part consists of reports, answers to or orders upon proceedings from other Courts, applications from ministerial officers, &c., must be carefully excluded, and nothing but *real* cases requiring a judicial finding and order should be entered. Proceedings under section 45 and section 75, Act VIII. (B. C.) of 1869, for example, should not be included in Statement C.

* 16 W. R. (Civ. Circs.) 8.
† *Ibid*, 11.
‡ 19 W. R. (Circs.) 8.
§ *Infra* (Circs.) 2.

A

ORIGINAL SUITS.

District of *Quarter of 187*

Class of Courts.	Pending from the last Quarter.				Suits Received			Suits Disposed of				Pending.				Remarks.
	Small Cause Court.	Rent.	Other.	Total.	By Institution.	By Transfer.	Total.	By Transfer.	On Trial.	Otherwise.	Total.	Small Cause Court.	Rent.	Other.	Total.	
District Judge ...																
Additional Judge ...																
Subordinate Judge ...																
Total ...																

District Judge.

PART II.
DETAIL OF PENDING CASES.

Class of Courts.	Small Cause Court Class Pending			Rent Suits Pending			Other Cases Pending			Remarks.
	More than 6 Weeks.	More than 3 Months.	More than 1 Year	More than 6 Weeks.	More than 3 Months.	More than 1 Year.	More than 3 Months.	More than 6 Months.	More than 1 Year.	
District Judge ...										
Additional Judge ...										
Subordinate Judge ...										
Total ...										

District Judge.

B

APPEALS.

District of *Quarter of 187 .*

Class of Courts.	SMALL CAUSE COURT CLASS.							RENT APPEALS.							OTHER APPEALS.							Remarks.
	Remaining from last Quarter.	Received		Total.	Disposed of		Pending.	Remaining from last Quarter.	Received		Total.	Disposed of		Pending.	Remaining from last Quarter	Received		Total.	Disposed of		Pending.	
		By Institution.	By Transfer.		By final Order.	By Transfer.			By Institution.	By Transfer.		By final Order.	By Transfer.			By Institution.	By Transfer.		By final Order.	By Transfer.		
District Judge ...																						
Additional Judge ...																						
Subordinate Judge ...																						
Total ...																						

District Judge.

PART II.

DETAIL OF PENDING APPEALS.

Class of Courts.	Small Cause Court Class Pending			Rent Appeals Pending			Other Appeals Pending			Remarks.
	More than 6 Weeks.	More than 3 Months.	More than 1 Year.	More than 6 Weeks.	More than 3 Months.	More than 1 Year.	More than 3 Months.	More than 6 Months.	More than 1 Year.	
District Judge ...										
Additional Judge ...										
Subordinate Judge ...										
Total ...										

District Judge.

C—1.

MISCELLANEOUS ORIGINAL CASES.

District of *Quarter of 187 .*

Class of Courts.	Remaining from last Quarter.	Received		Total.	Disposed of		Pending.	Of which pending			Remarks.
		By Institution.	By Transfer.		By final Order.	By Transfer.		More than 6 Weeks.	More than 3 Months.	More than 1 Year.	
District Judge											
Additional Judge											
Subordinate Judge											
Total ...											

District Judge.

C—2.

MISCELLANEOUS APPEALS.

Class of Courts.	Remaining from last Quarter.	Received		Total.	Disposed of		Pending.	Of which pending			Remarks.
		By Institution.	By Transfer.		By final Order.	By Transfer.		More than 6 Weeks.	More than 3 Months.	More than 1 Year.	
District Judge											
Additional Judge											
Subordinate Judge ...											
Total ...											

District Judge.

Draws attention to previous Circular regarding the punching of Stamps affixed to Documents.

CIVIL CIRCULAR MEMO. No. 4.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 14th February 1874.

(English Department.)

(*Civil.*)

THE attention of all Civil Courts subordinate to the High Court is drawn to the direction in paragraph 2 of Circular Order No. 3, dated 17th January 1871,* as to the punching of stamps affixed to documents issued by them at the time the stamps are affixed; and it is ordered that the duty be assigned in every Court to a specified responsible officer.

2. Blank papers for copies should, as usual, be presented with the application; but it is not necessary in such cases that stamps should be affixed to the blank papers; it will be enough if the adhesive stamp be made over to the officer whose duty it is to cancel stamps, and that officer will, if the request for a copy be allowed, at once affix the stamp to the paper, and cancel it by punching, but if it be not allowed, he will return the adhesive stamp to the petitioner, a note to this effect being made in the register, and signed by such officer.

Shows how Sittings of Honorary Magistrates and Benches of Magistrates should be entered in Statement D, Part I.

CRIMINAL CIRCULAR MEMO. No. 1.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 19th February 1874.

(English Department.)

(*Criminal.*)

As Honorary Magistrates in some districts are now exceedingly numerous, but, as a general rule, they singly try few cases, the Court directs that, in the first column of Statement D, Part I., the Honorary Magistrates, who have acted singly, may be entered together, and their cases exhibited in one line. But Benches of Magistrates, however composed, should be exhibited separately, one line to each, thus:—

Sudder Bench of Magistrates———
Ferozepore „ „ ———
Honorary Magistrates sitting singly———

* 15 W. R. (Civil Cirs.) 2.

NOTIFICATION.

THE following rules made by the High Court of Judicature at Fort William in Bengal, pursuant to section 20, clauses 1, 2, and 3 of the Court Fees Act, 1870, having been approved by the Lieutenant-Governor of Bengal, and sanctioned by the Governor-General of India in Council, are now published.

H. J. S. COTTON,
Offg. Registrar.

HIGH COURT,
The 23rd Feb. 1874.

Rules framed by the High Court of Judicature at Fort William in Bengal in accordance with clause 1, section 20, of the Court Fees Act of 1870, declaring the fees chargeable for serving and executing processes issued by the High Court in its Appellate Jurisdiction, and by the other Civil and Revenue Courts established within the limits of such jurisdiction.

RULE I.—The fees exhibited in the following table shall be charged for serving and executing the several processes against which they are respectively ranged:—

TABLE OF FEES.

PART I.—In the High Court, Appellate Jurisdiction—

	Proper Fee. Rs. A. P.
Article 1.—Every summons, subpœna, rule, notice, proclamation, injunction, or other order not elsewhere specified in this Table, Part I.	3 0 0

	Proper Fee. Rs. A. P.
Article 2.—Every commission to make a local investigation, or to take evidence, or for any other purpose—	
(*a*) in respect of the commission	3 0 0
(*b*) in respect of the remuneration of the Commissioner, *i. e.*, person who is to execute the commission, *per diem* ...	Such sum as the Court may direct.

Note.—A sum, sufficient to cover the daily fee (*b*) for such period as may be fixed by the Court for the purpose of executing the commission, must be paid in addition to the fee (*a*) at the time when the commission is issued; and, if the commission is not completely executed within the period so fixed, a further sum, sufficient to cover the daily fee (*b*) for the excess period extending from the end of that fixed period up to, and inclusive of, the date of the complete execution of the commission, must be paid before the Commissioner's report or other return to the commission is used.

	Rs. A. P.
Article 3.—Every warrant for arrest of the person ...	3 0 0

PART II.—In the Courts of Judges and Subordinate Judges, and in the Revenue Courts, when the suit in the Revenue Courts in which the process is issued is valued at a sum exceeding Rs. 1,000 :—

	Rs. A. P.
Article 1.—Every summons, subpœna, notice, proclamation, injunction, or other order not elsewhere specified in this Table, Part II.	2 0 0
Article 2.—Every commission to make a local investigation, or to take evidence, or for any other purpose—	
(*a*) in respect of the commission	2 0 0
(*b*) in respect of the remuneration of the Commissioner, *i. e.*, person who is to execute the commission, *per diem* ...	3 0 0

Note.—A sum, sufficient to cover the daily fee (*b*) for such period as may be fixed by the Court for the purpose of executing the commission, must be paid in addition to the fee (*a*) at the time when the commission is issued; and, if the commission is not completely executed within the period so fixed, a further sum, sufficient to cover the daily fee (*b*) for the excess period extending from the end of that fixed period up to, and inclusive of, the date of the complete execution of the commission, must be paid before the Commissioner's report or other return to the commission is used.

	Proper Fee. Rs. A. P.
Article 3.—Every process of attachment of property by notice or proclamation	2 0 0
Article 4.—Every process of attachment of property by actual seizure—	
(*c*) in respect of the warrant of attachment	2 0 0
(*d*) in respect of each man, necessary to ensure safe custody, who is left in possession, *per diem*	0 6 0

Note.—A sum, sufficient to cover the daily fee (*d*) for a period of at least one month, must be paid in addition to the fee (*c*) at the time when the process is obtained; and, if the attachment is continued beyond the month, a further like sum for the next month must be paid two clear days before the expiration of the month which has been already paid for, and so on for each ensuing month, otherwise the man or men in possession will be removed.

	Rs. A. P.
Article 5.—Every process of attachment by the arrest of the person	15 0 0
Article 6.—Every order for the sale of property—	
(*e*) in respect of the order of sale	2 0 0
(*f*) by way of poundage on the gross amount realized by the sale up to Rs. 1,000 ...	2 per cent.
Together with a further fee on all excess of gross proceeds beyond Rs. 1,000 of	1 per cent.

Note.—The portion (*e*) of this fee must be paid when the process is obtained, and the poundage (*f*) must be paid at the time of making the application for payment of the proceeds of sale out of Court, as hereinafter provided.

PART III.—In the Courts of Moonsiffs and of Small Causes, and in the Revenue Courts, when Part II. does not apply :—

	Rs. A. P.
Article 1.—Every summons, subpœna, notice, proclamation, injunction, or other order not elsewhere specified in this Table, Part III.	1 0 0

	Proper Fee. Rs. A. P.
Article 2.—Every commission to make a local investigation, or to take evidence, or for any other purpose—	
(*a*) in respect of the commission	1 0 0
(*b*) in respect of the remuneration of the Commissioner, *i. e.*, person who is to execute the commission, *per diem* ...	3 0 0

Note.—A sum, sufficient to cover the daily fee (*b*) for such period as may be fixed by the Court for the purpose of executing the commission, must be paid in addition to the fee (*a*) at the time when the commission is issued; and, if the commission is not completely executed within the period so fixed, a further sum, sufficient to cover the daily fee (*b*) for the excess period extending from the end of that fixed period up to, and inclusive of, the date of the complete execution of the commission, must be paid before the Commissioner's report or other return to the commission is used.

	Rs. A. P.
Article 3.—Every process of attachment of property by notice or proclamation.	1 0 0
Article 4.—Every process of attachment of property by actual seizure—	
(*c*) in respect of the warrant of attachment	1 0 0
(*d*) in respect of each man, necessary to ensure safe custody, who is left in possession, *per diem*	0 4 0

Note.—A sum, sufficient to cover the daily fee (*d*) for a period of at least one month, must be paid in addition to the fee (*c*) at the time when the process is obtained; and, if the attachment is continued beyond the month, a further like sum for the next month must be paid two clear days before the expiration of the month which has been already paid for, and so on for each ensuing month, otherwise the man or men in possession will be removed.

	Rs. A. P.
Article 5.—Every process of attachment by the arrest of the person...	5 0 0
Article 6.—Every order for the sale of property—	
(*e*) in respect of the order of sale	1 0 0
(*f*) by way of poundage on the gross amount realized by the sale up to Rs. 1,000 ...	2 per cent.
Together with a further fee on all excess of gross proceeds beyond Rs. 1,000 of ...	1 per cent.

Note.—The portion (*e*) of this fee must be paid when the process is obtained; and the poundage (*f*) at the time of making the application for payment of the proceeds of sale out of Court, as hereinafter provided.

RULE II.—Notwithstanding Rule I., no fee shall be chargeable for serving and executing any process, such as a notice, rule, summons, or warrant of arrest, which may be issued by any Court of its own motion, solely for the purpose of taking cognizance of, and punishing, any act done, or words spoken, in contempt of its authority.

RULE III.—No process which comes within the operation of Rule I. shall be drawn up for service or execution, except upon an application made to the Court for that purpose in writing, on a document bearing upon its face stamps not less in amount than the fee which by Rule I. is directed to be charged for serving and executing the process so sought to be drawn up. This application may, however, at the option of the party making it, be included in the petition by which he moves the Court to order the process to issue, but in that case the petition must bear the requisite stamps for the process-fee, in addition to such stamps, if any, as are needed for its own validity; and, in either case, the filing of the application thus duly stamped shall constitute payment of the fee chargeable for the process.

RULE IV.—In cases which are covered by the note to article 2 of Part I., and the note to articles (2) and (4) of Parts II. and III. of the Table of Fees in Rule I., the additional fee which may become payable after the process has been actually issued shall be paid by filing a written requisition to the Court to receive the fee, which document shall bear, on the face of it, stamps not less in amount than the additional fee, together with a memorandum of the purpose for which it is paid.

RULE V.—The proceeds of a sale effected in execution of any decree will only be paid out of Court on an application made for that purpose in writing, and the additional fee (*f*), article (6), Parts II. and III., must be paid by stamps affixed to, or impressed upon, the first of such applications; whether it be or be not made by the person who obtained the order for sale, or whether it does or deos not extend to the whole of the proceeds. No fee will be chargeable upon any such application subsequent to the first.

N. B.—The Fees paid in pursuance of these Rules must, in all proceedings, be deemed and treated as part of the necessary and proper costs of the party who pays them.

R. COUCH.
F. B. KEMP.
LOUIS S. JACKSON.
J. B. PHEAR.
A. G. MACPHERSON.
W. MARKBY.
F. A. GLOVER.
CHARLES PONTIFEX.
W. AINSLIE.
E. G. BIRCH.
G. G. MORRIS.

Rules framed by the High Court of Judicature at Fort William in Bengal in accordance with clause 2, section 20, of the Court Fees Act, 1870, declaring the fees chargeable for service and execution of the several processes in the Courts of Magistrates.

I.—The fees hereinafter mentioned shall be chargeable for serving and executing the processes to which the fees are respectively attached, *viz.*:—

		Proper Fee. Rs. A. P.
(1) Warrant of	For the warrant in respect of one person	1 0 0
	In respect of every additional person named therein	0 4 0
(2) Summons...	For the summons in respect of one person, or of the first two persons residing in the same place	0 8 0
	In respect of every additional person named therein	0 4 0
(3) Proclamation for absconding party under section 171, C. Cr. Procedure ...	For the proclamation	2 0 0
(4) Proclamation for witness not attending, section 353 ...	For the proclamation	1 0 0
(5) Warrant of attachment...	For the warrant	1 0 0
	Where it is necessary to place officers in charge of property attached, for each officer so employed per diem	0 4 0
(6) Warrant of levy of fine or of maintenance to wife, children, &c.	For the warrant	1 0 0
	and a percentage on the amount of fine or maintenance levied, *viz.*, 2 per cent. on sums not exceeding Rs. 100; and where the sum exceeds Rs. 100, then 2 per cent. on Rs. 100, and 1 per cent. on the amount of excess.	
(7) Written order	For the Order	1 0 0
(8) Injunction ...	For the Injunction	1 0 0
(9) Notice ...	For the Notice ...	1 0 0

II.—Nothing herein contained shall be deemed to authorize the levying of any fee for any summons to attend as a juror or assessor in a Court of Session, and no fee shall be chargeable on any such summons.

III.—No fee shall be chargeable in advance on any process of a Criminal Court in any case where the prosecution is on the part of Government, but it shall be competent to any Magistrate in such case, if the accused is convicted, to order that such fees shall be paid by the accused, or any of them, in like manner as if such fees had been paid by the prosecutor in the first instance.

IV.—Where any percentage is directed by these rules to be taken upon amounts levied as fines or maintenance, such percentage shall be deducted from the proceeds of any property sold, or shall be paid together with the amount levied, and with the other costs of process as stated in the warrant.

V.—When a proclamation has been issued for any absent witness, if the witness shall afterwards appear, and the Court shall be of opinion that such witness had absconded or concealed himself for the purpose of avoiding the service of a warrant upon him, such Court may order the witness to pay the cost of the proclamation.

VI.—In districts named in the margin, where the sub-divisional system has not been fully introduced in every case where

Rajshahye.	Beerbhoom.
Bograh.	Cachar.
Dinagepore.	Chittagong.
Malda.	Noakhally.
Rungpore.	Singhbhoom.
Bancoorah.	Nowgong.

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process has to be executed at a distance of more than 25 miles from the Court from which it is issued, an addition of one-fourth is to be made to the fee chargeable; and, if more than 50 miles, an addition of one-half.

R. COUCH.
F. B. KEMP.
LOUIS S. JACKSON.
J. B. PHEAR.
A. G. MACPHERSON.
W. MARKBY.
F. A. GLOVER.
CHARLES PONTIFEX.
W. AINSLIE.
E. G. BIRCH.
G. G. MORRIS.

Rules framed by the High Court of Judicature at Fort William in Bengal, in accordance with clause 3, section 20, of the Court Fees Act, 1870:—

1. THE following monthly salaries shall be allowed to the Nazir and other persons employed in the service or execution of processes of the Civil Courts:—

1st.—In the Court of the District Judge—

	Rs.
The Nazir being the person responsible for due service and execution of all processes in the Courts at the Sudder Station ...	100
Rising by increments to ...	200
His Clerk or Taidnavis ...	10
Peons, 2nd grade ...	8
„ 1st grade, after three years' approved service ...	10

2nd.—In the Court of the Subordinate Judge, not being Judge of a Small Cause Court—

Naib Nazir, Rs. 25 to 35, according to circumstances.
Peons, as in Judge's Court.

3rd.—In the Court of the Sudder Moonsiff—

	Rs.
Naib Nazir ...	20
Peons, 2nd grade ...	6
„ 1st grade, after three years' approved service ...	8

4th.—In the Courts of Moonsiffs not at the Sudder Station—

	Rs.
Nazir ...	25
Peons, 2nd grade ...	6
„ 1st grade, after three years' approved service ...	8

5th.—Small Cause Courts—

Nazir, Peons } as at present.

Peons in the Revenue Court of a Collector shall be remunerated as those in the Court of the District Judge. Peons in the Revenue Court of a Deputy Collector shall be remunerated as those in the Court of a Moonsiff.

2. The following monthly salaries shall be allowed to the peons and other officers employed in the service or execution of processes in the Courts of the Magistrates:—

1st.—In the Court of the Magistrate of the District—

Court Inspector (or Nazir) responsible for the due service and execution of all processes in the Courts of the several Magistrates at the Sudder Station, as at present.

	Rs.
Peons, each	7

2nd.—In Sub-Divisional Magistrates' Courts—

Court Inspector (or Nazir) of Sub-Division, as at present.

	Rs.
Peons, each	7

Note.—The rates of remuneration for peons provided by these rules are intended to secure the services of men who can read and write. But, whenever, on the occurrence of a vacancy, candidates thus qualified shall not be available, the Court, on whose establishment the vacancy exists, may record a declaration to that effect, and may then appoint temporarily some person whom it may consider competent to perform the duties, and who shall be paid at the rate of Rs. 5 per mensem in Moonsiffs' Courts, and Rs. 6 per mensem in all other Courts. Provided that such appointments, when made by a Court subordinate to the District Judge, or the Magistrate of the District, shall be subject to the approval of such Judge or Magistrate, and shall cease as soon as duly-qualified candidates shall be procurable.

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NOTIFICATION.

THE following are the rules made by the High Court of Judicature at Fort William in

Bengal, and approved by the Lieutenant-Governor of Bengal and by the Governor-General of India in Council, under section 22 of the Court Fees Act, 1870:—

H. J. S. COTTON,
Offg. Registrar.

HIGH COURT, }
The 23rd Feb. 1874. }

Rules framed by the High Court of Judicature at Fort William in Bengal, in accordance with section 22 of the Court Fees Act, 1870:—

1st.—THE Judge of every District in the Regulation Provinces shall ascertain the average number of processes issued from his own Court, and from each of the Courts subordinate thereto, during three years last past.

2nd.—To this shall be added, in the Districts to which Act VIII. of 1869 (B.C.) has been extended, the average of processes issued by the Revenue Courts of the same District.

3rd.—The peons to be employed in each District shall be in number sufficient for the execution of a like number of processes, each peon being, for this purpose, considered capable of executing—

In the Zillah Court and the Subordinate Judge's Court, per annum	200
In the Moonsiff's Court, per annum ...	250
In the Courts of Small Causes, per annum	300

4th.—In order to provide for the service of processes of certain kinds, which occupy a longer period, and in respect of which a higher fee is charged, 25 per cent. may be added in each case to the average ascertained under the 1st and 2nd Rules.

5th.—In the Districts named in the margin, where the peons entrusted with a large proportion of processes have to be conveyed by boat, the number of processes which each peon is expected to serve may be reduced by one-third, and the number of peons to be employed shall be calculated accordingly.

Backergunge.	Chittagong.
Dacca.	Dinagepore.
Jessore.	Mymensingh.
Sylhet.	Rajshahye.
Kamroop.	Rungpore.
Nowgong.	
Luckimpore.	

N.B.—For the Districts in the 2nd column, the calculation is to be made for from May to October inclusive only.

6th.—Where there are in any District several Courts of any one class, the Judge may authorize the appointment of such number of peons on the whole for such Courts as may suffice for executing the total number of processes, and may from time to time apportion such peons according to need among such Courts.

7th.—When it appears to the District Judge that the number of processes issued out of any Court or class of Courts in his District has increased by 10 per cent., he shall be competent to make a corresponding increase in the number of peons; and, if there shall be a diminution to the like extent, or if he shall be satisfied that the processes of all or some of such Courts can be executed by a smaller number of peons, it shall be his duty to make a reduction accordingly.

Rules framed by the High Court of Judicature at Fort William in Bengal, in accordance with section 22 of the Court Fees Act, 1870:—

1st.—THE Magistrate of every District shall ascertain the average number of processes issued in a year from his own Court and from each of the Courts subordinate thereto, during three years last past.

2nd.—The peons to be employed in each District shall be in number sufficient for the execution of a like number of processes, each peon being, for this purpose, considered capable of executing 300 processes per annum.

3rd.—In the Districts named on the margin, where the peons entrusted with a large proportion of processes have to be conveyed by boat, the number of processes which each peon is expected to serve may be reduced by one-third, and the number of peons to be employed shall be calculated accordingly.

Backergunge.	Chittagong.
Dacca.	Dinagepore.
Jessore.	Mymensingh.
Sylhet.	Rajshahye.
Kamroop.	Rungpore.
Nowgong.	
Luckimpore.	

N.B.—For the Districts in the 2nd column, the calculation is to be made for from May to October inclusive only.

4th.—Where it appears advisable to the Magistrate of the District, he may authorize the appointment of such number of peons on the whole for all the Courts in his District as may suffice for executing the total number of processes of those Courts, and may, from time to time, apportion such peons according to need among such Courts.

5th.—When it appears to the District Magistrate that the number of processes issued out of any Court or Courts in the District has increased by 10 per cent., he shall be competent to make a corresponding increase in the number of peons; and,

re shall be a diminution to the like ent, or, if he should be satisfied that the cesses of all or any of such Courts can executed by a smaller number of peons, shall be his duty to make a reduction ordingly.

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lls for Lists of Advocates and Pleaders practising in the several Civil Courts in the Mofussil.

CIVIL CIRCULAR MEMO. No. 5.

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rom the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 18th February 1874.

(English Department.)

(*Civil.*)

Every District Judge and Judicial Commissioner, subject to the control of the High Court, is requested to forward to this office, within fifteen days after the 1st April next, correct list, according to the enclosed form of the Advocates and Pleaders practising in his own Court and in each Moonsiff's Court in his district.

2. The different classes of Pleaders, senior and junior, should be carefully discriminated, and the Government Pleader should be described as such.

District Court and Subordinate Judge's Court of

Name of Advocate or Pleader.	Nature of Qualification. (A.)	Date of Qualification.	Date of last License.	REMARKS.
				(A) *e.g.*, "Advocate of High Court," "B. L. Vakeel of High Court," "1st grade Diploma-holder," &c., &c.

Small Cause Court of and Moonsiff's Court.

Name of Pleader.	Nature of Qualification.	Date of Qualification.	Date of last License.	REMARKS.
				Those who hold license for both Courts should be distinguished.

Draws attention to Financial Department Notification ruling that no Travelling Allowance can be drawn for a journey to a place not more than 5 miles distant from Travelling Officer's Head-Quarters.

CIVIL CIRCULAR MEMO. No. 6.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 4th March 1874.

(English Department.)

(*Civil.*)

In connection with, and in modification of

Circular Orders cited on the margin, in so far as they relate to the receipt of travelling allowance from Government by Nazirs or other public officers, the attention of the Civil Courts subordinate to the High Court is drawn to the Notification of the Government of India in the Financial Department, No. 929, dated 5th February 1874,* ruling that "no public servant shall draw travelling allowances for a journey taken from his head-quarters to visit any place not more than five miles distant therefrom."

C. O. No. 30, dated 10th October 1863, paragraph 3.
C. O. No. 26, dated 5th September 1871.
C. O. No. 31, dated 25th September 1867, paragraph 5.
**Vide Calcutta Gazette* of 11th February 1874, Part I., p. 361.

Cases in course of Transfer when year closes should be shown in Annual Judicial Statements Nos. 8 & 9 as pending in Court to which they have been transferred.

CIVIL CIRCULAR MEMO. No. 7.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 6th March 1874.

(English Department.)

(*Civil.*)

THE Court is pleased to direct that, in the preparation of Judicial Statements (Annual) Nos. 8 and 9, prescribed by Circular Order No. 32, dated 8th November 1870, cases in course of transfer, when the year closes, shall be shown in the Returns for that year as pending in the Court to which they have been transferred. The Court expect accordingly that, in the Returns for 1873, all cases transferred on or before 31st December will be accounted for by the Courts to which they belong in consequence of such transfer.

Enjoins Observance of the Proper Practice with regard to the taking of formal contemporaneous proof of the service of notice in foreclosure proceedings under Regulation XVII. of 1806.

CIVIL CIRCULAR ORDER No. 8.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 7th March 1874.

(English Department.)

(*Civil.*)

IT having been brought to the notice of the Court that, in one of the Districts within the Court's jurisdiction, the practice of taking formal contemporaneous proof of the service of notice in foreclosure-proceedings under Regulation XVII. of 1806, is not observed, the Court are pleased to direct that, if in any other District a similar omission prevails, the proper practice should be introduced.

Directs Appellate Courts in all Appeal Cases to transmit to the Lower Court a copy of the judgment passed as well as of the decree.

CIVIL CIRCULAR ORDER No. 9.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 7th March 1874.

(English Department.)

(*Civil.*)

IT having been brought to the notice of the Court that, in some Districts, the Appellate Courts do not transmit to the lower Courts copies of the judgments passed by them in appeal, the Court are pleased to direct that, as a general rule for the purposes of section 361 of the Civil Procedure Code, the term "decree" shall be taken to include the judgment, and to desire that, in all cases of appeal, the Appellate Court will transmit to the lower Court a copy of the judgment passed as well as of the decree. It is right and very desirable that the lower Court, especially if its decision be reversed or modified, should have an opportunity of seeing the judgment of the Appellate Court.

ews attention to High Court Rules under the Court Fees Act published in "Calcutta Gazette" f 25th February 1874.

CIVIL CIRCULAR ORDER No. 10.

om the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 7th March 1874.

(English Department.)

(*Civil and Criminal.*)

THE attention of all District Judges and istrict Magistrates, as well as of the Civil d Criminal authorities subordinate to them, drawn to the Rules drawn up by the Court der section 20 of the Court Fees Act of 870, notified in the *Calcutta Gazette* of the 25th February 1874, Part I., pp. 476 *et seq.*, nd to the Rules drawn up under section 22 f the same law (VII. of 1870), notified at age 480 of the same issue of the Gazette.

2. Immediate effect must be given to hese Rules.

Prescribes forms of Registers showing the Income and Expenditure on account of Civil Ameens.

CIVIL CIRCULAR ORDER No. 11.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 14th March 1874.

English Department.

(*Civil.*)

THE Returns made to the Court for 1872-73, under Circular Order No. 12, dated 8th April 1872, having been found inaccurate owing to the inclusion in column 2* of commission on execution-sales where such sales have been effected by the Nazir or other officer not being a Civil Court Ameen, and the object of the Circular Order being to ascertain the financial results of the employment of Ameens only, the Court are now pleased to prescribe the accompanying forms of Registers to be kept up in all the regular Civil Courts subordinate to the High Court.

* "Receipts on account of the employment of Ameens permanently entertained."

2. The register of receipts, it will be seen, has been so framed as to exclude all moneys not due to the employment of Civil Court Ameens; and the register of disbursement so as to show only salaries paid and excess payments refunded. The first Return to be submitted in this form of statement will be for the financial year 1873-74.

Register of Receipts on Account of Civil Court Ameens. District of

Date.	Court.	Nature of Employment.	Ameen employed.	Time occupied.	Amount.			Remarks.
					Rs.	As.	P.	
1st January ...	Sub-Judge ...	Local investigation, Mouzah Suntoshpore.	Sheikh Dilawan ...	10 days ...	50	0	0	Rs. 20 refunded.
3rd ,, ...	Moonsiff of Sundip	Sale of Moveables ...	R. C. Doss ...	1 day ...	5	0	0	

Register of Expenditure on account of Civil Court Ameens. District of

Date.	Nature of Expenditure.	Amount.			Remarks.
		Rs.	As.	P.	
2nd January	Salary of Dilawan	70	0	0	
3rd ,, ...	Refund over charge in case of deposited ...	15	0	0	

Substitutes New Rules in supersession of the first 4 rules for the qualification, &c., of Pleaders and Mookhtears in Mofussil Courts.

High Court of Judicature at Fort William in Bengal.

NOTIFICATION.

In supersession of the first four rules drawn up by the High Court in accordance with section 4, Act XX. of 1865, for the qualification, admission, and enrolment of Pleaders and Mookhtears in Mofussil Courts, dated the 11th September 1873, and published in the *Calcutta Gazette* of 17th September, 24th September, and 1st October 1873, Part I., at pages 1105, 1131, and 1158, respectively, the following four revised rules have been drawn up by the High Court under the said section of the aforesaid Act, and are published for general information.

(Sd.) H. J. S. COTTON,
Offg. Registrar.

I. Pleaders in the Mofussil Courts of the Regulation Provinces, within the limits of the jurisdiction of the High Court, shall, as regards qualification for practising in Civil Courts, be of two grades.

II. Those of the higher grade shall be competent to appear, plead, and act in any Civil Court subordinate to the High Court.

III. Those of the lower grade shall be competent to appear, plead, and act in the Courts of Moonsiffs and in Small Cause Courts and in the Courts of Officers in the District of Cachar, and the Divisions of Assam, Chota Nagpore, and Cooch Behar, exercising the powers of Moonsiffs under the Bengal Civil Courts Act, 1871.

IV. Mookhtears duly admitted and enrolled may (subject to the conditions of their certificates as to the class of Courts in which they are authorized to practise) appear and act in any Civil Court subordinate to the High Court.

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HIGH COURT,
The 9th March 1874.

Rules relating to Special Appeals :—

I. The paper-book in all cases of Special Appeal, except appeals not exceeding Rs. 50 in value, will consist of the following papers; those not originally in the English language being translated into English :—

(a).—The Plaint.

Note.—Lengthy schedules and descriptions of boundaries appended to plaints may be omitted.

(b).—The Plaintiff's written statement if any.

(c).—The Defendant's written statement.

Note.—When there are several sets of defendants in a suit, the written statements of defendants, not parties to the Special Appeal, either as appellants or respondents, may be omitted.

(d).—The Judgment of the First Court.

(e).—The Judgment of the Lower Appellate Court.

(f).—Any Judgments or Orders of Remand passed in the case, either by the Lower Appellate Court on appeal, or by the High Court on Special Appeal.

(g).—The Memorandum of Special Appeal.

(h).—A front leaf containing the number of the cause, names of the Judges of the two Courts below, names of the parties and of their vakeels, date of the institution of the suit, date of the judgment of the first Court, date of the judgment of the Lower Appellate, Court, date on which the Special Appeal was filed, date of service of notice upon the respondents, and date on which the cause was ready for hearing.

II. In each case of Special Appeal, the Deputy Registrar will cause to be printed 12 copies of the paper-book as aforesaid for the use of the Judges of the High Court and of the parties or their vakeels; the copies furnished to the parties or their vakeels being charged and previously paid for at the rate of Rs. 5 a copy, in the manner following.

III. The appellant, at the time of filing the memorandum of Special Appeal, and the respondent, at the time of entering appearance through a vakeel or attorney of the High Court, will deposit with the Accountant the costs of one or more copies of the paper-book as may be required, at the rate of Rs. 5 a copy. The costs so paid to be costs in the cause, provided that no more than the costs of one copy be allowed, unless specially ordered by the Court.

IV. When the cause is ready for hearing, the Deputy Registrar will furnish the vakeels or attorneys engaged on either side with copies of the paper-book, for which costs shall have been deposited as aforesaid. The issue of paper-books to the vakeels or attorneys will be notice to them that the case is ready for hearing.

V. No memorandum of Special Appeal filed through a vakeel or attorney of the High Court, nor a *first* vakalutnama or power-of-attorney for the appearance of the respondents, will be admitted or received, unless, at the time of presentation, the costs of at least one copy of the paper-book be deposited with the Accountant under Rule III.

Provided that any second or other vakalutnama or power-of-attorney for the appointment of new vakeels or attorneys, or re-appointment of former vakeels or attorneys by representatives of deceased parties, may be filed without such deposit.

VI. In analogous cases governed by one judgment, the Court, on application, will make a special order.

R. COUCH.
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HIGH COURT,
The 12th Mar. 1874.

Calls attention to new Rules published in "Calcutta Gazette" of 11th March, as to Fees and Charges of the High Court in its Original Civil Jurisdiction.

CIVIL CIRCULAR ORDER No. 12.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 27th March 1874.

HIGH COURT.

(English Department.)

(*Civil.*)

THE attention of the Civil Courts subordinate to the High Court is drawn to the Rules published by Notification, dated 5th March 1874, in the *Calcutta Gazette* of the 11th idem, Part I., page 557, to take effect from the 9th March 1874, as to fees and charges of the High Court in its Original Jurisdiction.

2. It will be seen that Schedule V.* of the Tables published therein (which is re-produced as an appendix to this Circular Order) supersedes the scale of fees promulgated with Circular Order No. 188, dated 7th October 1852, as well as the rates mentioned in Circular Memo. No. 2, dated 21st February 1870, and Circular Memo. No. 4, dated 16th February 1872.

* *Fees and charges to be allowed to the Sheriff.*

Fees and charges to be allowed to the Sheriff.

		Rs.	A.	P.
1.	For arresting each person named in a writ when nothing is realized... ...	16	0	0
	Otherwise ...	2	0	0
	NOTE.—The latter fee to be allowed, plus poundage on sums levied.			
2.	For executing any attachment against moveable or immoveable property ...	2	0	0
3.	For serving each juryman with summons ...	2	0	0
	(To be charged to the Fine Fund.)			
4.	For serving every other summons, for each person served ...	2	0	0
5.	For executing every writ of Habeas Corpus, injunction, or other writ for which a fee is not specially provided, each person against whom the writ is directed ...	2	0	0
6.	For executing warrants for apprehension of witnesses, and warrants for security to be furnished by defendant (issued by another Court), for each person ...	4	0	0
7.	For serving summons, notice, proclamation, subpœnas, &c. (issued by another Court), for each person served ...	2	0	0
8.	For serving citation ...	2	0	0
9.	For every ordinary return ...	1	0	0
10.	For every special return ...	2	0	0
11.	For translations when necessary, per folio ...	0	8	0
12.	For every warrant to discharge defendant from custody ...	2	0	0

		Rs.	A.	P.
13.	For bringing up defendant from jail after remand ...	2	0	0
14.	For every certificate of seizure...	5	0	0
15.	For every other certificate ...	2	0	0
16.	For drawing every security-bond in mofussil cases ...	8	0	0
17.	Office copies, per folio ...	0	8	0
18.	For attending Court or before a Judge or other Officer of Court with papers ...	3	0	0
19.	For every bond of indemnity for seizing property, &c., when there are adverse claims ...	32	0	0
20.	For every search when no certificate of office copies obtained...	1	0	0
21.	Poundage on sums levied by the Sheriff in execution, for the first Rs. 1,000 at 5 per cent., and for rest 2½ per cent.			
22.	Poundage on a writ of possession upon every Rs. 10 of the yearly value ...	0	8	0
23.	For attending Court during each Criminal Sessions, per diem...	16	0	0

(To be charged to the Fine Fund.)

Bailiffs for executing Summons, &c.

		European. Rs.	A.	P.	Native. Rs.	A.	P.
1.	For serving Summons—						
	As to defendants residing in the same house when served personally, or when service effected by delivery of the summons to one person—						
	For the first defendant ...	4	0	0	1	0	0
	For every other defendant ...	2	0	0	0	8	0
	By fixing a copy to the door of the dwelling-house—						
	For all the defendants residing in the same house who may be thus served	6	0	0	2	0	0
2.	In other cases for—						
	Serving each defendant ...	4	0	0	0	8	0
3.	For serving citations ...	2	0	0	1	0	0
4.	For arresting a party ...	16	0	0	4	0	0
5.	For bringing him up before the Court, when the Sheriff's officer is detained in Court for three hours and upwards ...	8	0	0	2	0	0
	Otherwise ...	4	0	0	1	0	0
	If the party be arrested after the rising of the Court, for bringing him up before the Court on the following day and lodging him in jail after committal ...	8	0	0	2	0	0
	NOTE.—This fee is to be reduced to Rs. 4 and Re. 1 if the party on being brought up should be released.						
	If the party be released upon security to appear on another day, for attending the Court to take him into custody ...	4	0	0	1	0	0
	For lodging him in jail, if committed	4	0	0	1	0	0
6.	For every affidavit of service of summons ...	2	0	0	0	8	0
7.	For attaching moveable property	16	0	0	0	0	0
8.	For attaching or giving possession of immoveable property, for the first parcel	16	0	0	0	0	0
	For every other parcel ...	2	0	0	0	0	0

lls for a return for Costs incurred in civil suits or the first 50 cases decided in 1873 by each Court.

CIVIL CIRCULAR MEMO. No 9.

rom the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 4th May 1874.

(English Department.)

(*Civil.*)

THE Court is pleased to direct all District udges and Judicial Commissioners to send p a return of costs incurred in civil suits in ie form annexed, for the first 50 cases (of which the records are available) decided in 873 by each Court in the district, *viz.*, the Courts of Subordinate Judges and Moonsiffs nd the Small Cause Courts.

2. The cases, though otherwise taken in he order of decision, should comprise, in nearly equal proportions, suits for rent, for money, and for immoveable property.

3. Each suit is to be entered separately in its order as above explained.

4. In the specimen form which accompanies the Circular Order, several of the columns have been filled up by way of example. Costs in appeal and costs after execution will be the subject of separate requisitions hereafter.

5. The attention of District Judges and their subordinates is directed to the faithful and accurate preparation of these returns, which will be useless or worse if not correct.

Statement of Costs as compared with Amount of Claim in the under-mentioned Suits decided in the Court of the in the District of

No of Suit.	Nature of Demand.	Amount or Value. Principal.	Amount or Value. Interest.	Plaintiffs' Costs. 1 Institution Fee Stamp.	2 Court-fees of every kind not included in Cols. 1 and 3.	3 Tulubana.	4 Witnesses' Diet-money, Travelling Expenses, Commissions, &c.	5 Local Inquiries and Commissions to examine Accounts, including all Payments made to Ameens.	6 Pleaders' Fees.	7 Other Costs not included in previous Cols.	8 Total Costs up to Judgment.	Defendants' Costs. 1 Court-fees of every kind not included in Col. 2.	2 Tulubana.	3 Witnesses' Diet-money, Travelling Expenses, Commissions, &c.	4 Local Inquiries and Commissions to examine Accounts, including all Payments made to Ameens.	5 Pleaders' Fees.	6 Other Costs not included in previous Cols.	7 Total Costs up to Judgment.	Judgment for	Amount or Value decreed. Principal.	Amount or Value decreed. Interest.	Amount or Value decreed. Costs.
		Rs.	Rs.																	Rs.	Rs.	Rs.
10 of 1873	Land	10,000	...																Plaintiff ...	12,500	700	As it may be.
.....	Wasilat	2,500	700																Ditto ...	3,500	750	000
59 of 1873	Bond Debt	3,500	1,700																Defendant ...	...	...	000
21 of 1873	Land, &c.	...	...																Plaintiff ...	850	65	000
45 of 1873	Rent of talook and interest.	4,600	370																			

direct the charge of a fee on every commission. Clause *a* applies to all commissions. Clause *b* only applies to the cases in which an officer of the Court specially appointed and paid by Government is employed. The charge for the services of such an officer is properly a Court-fee payable to Government, which is therefore to be paid in stamps; and to such fees alone the rules apply. But when the Commissioner is a person not receiving pay from Government in respect of his employment as a Commissioner, the rules of remuneration prescribed by Circular Order No. 10, above referred to, apply, and the Commissioner will be paid in cash.

(5.) If the services of peons are required to serve any process which an Ameen or Commissioner is authorized to issue, a fee will be charged under the appropriate heading in the rules. The employment of peons as personal attendants on the Commissioner was not contemplated and is not authorized.

(6.) The amount of fee, when an officer is deputed to put a party in possession under a decree, is to be determined, according to circumstances, either under Article 1 or Article 2 at the discretion of the Court. If the delivery of possession is merely a formal act and a peon can be employed, the fee as for an order would be charged under Article 1; but if the transaction is more complicated (as involving inquiry or the making of an inventory, or the like), a commission to a superior officer would more properly issue, and a fee would be chargeable accordingly.

(7.) In the event of an excess deposit for a commission, or of a compromise rendering it unnecessary to execute the commission at all, the parties will be entitled to a refund in cash of the excess, or, as the case may be, of the whole of the fees deposited under Clause *b*, but not of the fee under Clause *a* in any case. The Accountant-General will issue separate instructions as to the form of voucher that will be necessary to obtain such refunds.

(8.) Article 3, Parts II. and III., prescribes the fee leviable on every process of attachment of property by notice or proclamation. One fee only is chargeable under this article for each process irrespective of the number of items of property therein contained. Where copies have to be issued, no separate charge can be made under the rules as they stand.

(9.) The rules laid down in the note to Article 4, Parts II. and III., must be followed. Refunds, where properly claimable under this note, will be made in such mode as may hereafter be settled in communication with the Accountant-General.

(10.) As there are no stamps of less denomination than one anna, fractions of an anna are to be abandoned under the rules.

(11.) The heading of the rules shows that they have no application to Revenue Officers acting otherwise than in a judicial capacity, or, in other words, than when they act as Revenue Courts.

(12.) The following Circular Orders are hereby declared cancelled or modified:—Circular Order No. 31, dated 25th September 1867, is cancelled, except paragraph 5 which will continue in force, and for convenience of reference is reproduced in the margin. Circular Order No. 20, dated 25th June 1872, is wholly cancelled, as it is superseded by Rule III. of the new rules. Paragraph 2 of the Circular Order No. 10, dated 31st May 1873, is in so far affected by the rules that a fee is now to be charged under Clause *a*, Article 2, Parts II. and III., upon every commission. Circular Order No. 17, dated 2nd August 1873, is superseded by Rule III., so far as refers to the affixing of stamps to the process. In cases where application is made for the issue of process beyond the jurisdiction of the Court, the application will bear the proper stamp, and an endorsement will be made on the process to the effect that the proper stamps have been affixed to the application. Circular Order No. 19, dated 6th August 1873, is superseded by Article 6, Parts II. and III. of the Rules, and is wholly cancelled.

In addition to [other] fees, the actual charge which must be incurred if it is necessary to employ boats or cross-ferries is to be levied from and paid by the person at whose instance the process is issued, before issue of the process to the peon who carries the process.

II.—Rules under Clause 2, section 20 of the Court Fees Act, declaring the fees chargeable in the Courts of Magistrates.

(13.) Rule I., Clauses 1 and 2, prescribes the fees leviable upon warrants of arrest and summonses. The process is one, whether one or more persons be named therein, and whether such persons reside in one place or not, but an additional fee of 4 annas is chargeable in respect of every person exceeding one named in a warrant, and an additional fee of 4 annas is chargeable in respect of every additional person, not being the second person of more than two residing in the same village, named in a

summons. Thus, if the summons include one person residing in village A, and a second person residing in village B, the additional fee is chargeable in respect of such second person.

(14.) Magistrates may follow the principle of Rule III. of the rules under clause 1, section 20, for the Civil Courts, in realizing Court-fees in Criminal Courts.

(15.) The charge for boat hire, when it has to be incurred, is not a Court-fee realizable by stamps. There is nothing in the rules to introduce a change in the existing practice, and the charge must be borne as heretofore by Government.

III.—Rules under clause 3, section 20, Act VII. of 1870, for the remuneration of persons employed in the service of processes.

(16.) The intervals and rate of increment which govern the increase of salaries of the establishment to which the officer belongs are applicable under these rules, and will take effect from the date of their promulgation, except when the application of this order will reduce the pay of present duly-qualified peons.

(17.) The establishment of peons of a Subordinate Judge's Court, when the Subordinate Judge is also Judge of the Court of Small Causes, is to be kept distinct from the Small Cause Court establishment.

IV.—Rules under section 22, Act VII. of 1870, for calculating the number of peons to be employed by Civil Courts and Magistrates.

(18.) Clause 2, section 20 of the rules, clearly indicates that only processes in cases of offences, other than offences for which police-officers may arrest without warrant, are to be served by peons employed under the Court Fees Act.

Draws attention to Circular of June 1870, directing that applications for forms should be made to Superintendent of Stationery.

CIVIL CIRCULAR MEMO. No. 13.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 13th May 1874.

(English Department.)

(*Civil.*)

THE attention of all District Judges is drawn to the Circular Order No. 16, dated 17th June 1870,* directing that applications for forms required by Judges should be made to the Superintendent of Stationery, who has received instructions to supply only such forms as have been approved by the High Court.

2. The issue of this Circular is rendered necessary, because in some Districts it is found that Judges continue to make use of their own forms without the sanction of the Court.

* 14 W. R. (Civil Circs) 1.

REVENUE CIRCULARS.

DECEMBER 1873.

HON'BLE V. H. SCHALCH.

Alteration in Board's Rules, section 5, page 345.

No. 1.

IN lines 3, 4, and 5, clause 5, section 5, page 345, Board's Rules, for the words "Rate for establishments, travelling allowances, stationery, and postages levied from Wards' and Attached Estates managed by the Revenue Department," substitute the words "The fund for the general management of Wards' and Attached Estates." This change is made under the orders of Government.

The value of Revenue abated as Compensation for Land taken for Public Purposes how to be credited and entered in Table V. of Return No. X.

No. 2.

WITH reference to paragraphs 28 and 29 of the Instructions for the Guidance of Collectors in the Acquisition of Land for Public Purposes, District Officers are requested to credit in future the value of revenue abated as compensation for land taken up under Act X. of 1870 to "Miscellaneous Land Revenue," and to enter it under a new heading *f* 1, Table V. of Return No. X., immediately after the heading *f*, "Sale of Government Estates."

Settlements of Fisheries to be reported to the Board for Confirmation: what Report should contain.

No. 3.

SETTLEMENTS of fisheries, whether the property of Government or otherwise, like settlements of estates consisting of land, should be reported to the Board for confirmation. But the form of report required by section 12, page 287, of the Board's Rules, in the case of settlements of the latter kind, need not be submitted for the settlement of fisheries. It will be sufficient to show in the report the number of the fishery mehal on the taujih, the geographical limits of the right, the term of the lease, and the rent. The report should also explain briefly the nature of the fishing (*viz.*, the fish caught, and the means used to catch them), the position of the lessee (*e. g.*, whether he is himself a fisherman, or a speculator who intends to sub-let to the actual catchers of fish), and the mode of settlement adopted, whether by sale to the highest bidder or otherwise.

Lays down New Annual Return (Table VI.) regarding Demand and Collection of Land Revenue.

No. 4.

GOVERNMENT having called for the annual submission, with the Board's Land Revenue Report, of certain information in regard to demand and collection of land revenue,

which is not to be obtained in the required form from Return No. X., it has become necessary that an additional Table VI. should be submitted with that Return at the close of each financial year.

It should be submitted in the following form :—

1	2	3	4	5	6	7	8	9
Description of Revenue.	Arrear demand for 1873-74.	Current demand for 1873-74.	Total demand for 1873-74.	Arrear collections of 1873-74.	Current collections of 1873-74.	Total collections of 1873-74.	Remissions granted during the year.	Balance outstanding at close of year.
(a.)—From settled estates bearing revenue in past years ...								
(b.)—From settled estates added to revenue-roll during year of report ...								
(c.)—From settled estates taken off the revenue-roll during the year of report ...								
(d.)—Collections from Government estates ...								
(e.)—Collections from ryotwary tracts ...								
(f.)—From sale of Government estates ...								
(g.)—Miscellaneous land revenue not included in the above ...								
Total ...								

If the headings (*a*), (*b*), (*c*), and (*d*) were grouped together, the Return No. X. would already furnish the means of constructing this Table; but the peculiar classification of estates prescribed necessitates a separate Table.

Additional Rule (clause 5A, section 3, Chapter XXV.) regarding Wards' and Attached Estates.

No. 5.

A CASE having recently occurred in which it was discovered, after an estate had been made over to a ward on the attainment of his majority, that a debt was due to the Calcutta Wards' Institution, and difficulty having been experienced in the recovery of this debt, the Member in charge directs that the following rule should be added as clause 5A, section 3, Chapter XXV. (Wards' and Attached Estates) of the Board's Rules at page 342 :—

Two months before the date on which any minor, who is being educated at a Government Wards' Institution, will attain his majority, the Collector shall report, through the Commissioner, to the Board of Revenue, the approaching termination of the trust, in order that intimation may be given to the Director of the Wards' Institution, and the necessary steps may be taken to realize any demands on account of the education of the minor.

Corrections in section 4, page 176, Board's Rules, consequent on Board's no longer having to countersign Commissioners' Contingent Bills.

No. 6.

GOVERNMENT having decided that it is no longer necessary that the Board should countersign Commissioners' contingent bills, the following corrections are made in section 4, page 176 of the Board's Rules :—

Clause 5, score out the words "Commissioners and."

In clause 6, line 4, the words "or a Commissioner" should be expunged.

A. MONEY, ESQ., C.B.

Addition to Board's Rule 28, page 7 of the Salt Manual.

No. 7.

AFTER the words "to the Board of Revenue" in line 3 of Rule 28, at page 7 of the Salt Manual, add the words "or to the District Collector if authorized to grant the original rowannah."

JANUARY 1874.

THE HON'BLE V. H. SCHALCH.

No. 1.

Draws Attention to Various Provisions in the Bengal Embankment Act (VI. of 1873).

THE attention of Commissioners and Collectors is drawn to the Bengal Embankment Act, VI. (B.C.) of 1873, which has recently become law.

2. It will be observed that the Act differs from the preceding Acts relating to the same subject, mainly in the following particulars :—

(*a.*) All public embankments are divided into two classes: (1) Those entered in Schedule D, the whole expenses attending which are to be borne by Government; and (2) those not entered in the said Schedule. The expenses attaching to the latter, when taken charge of by Government, are to be borne, *not*, as formerly, by the parties bound to maintain them (see section 11 of Act XXXII. of 1855), but by the zemindars of the estates and the proprietors of the tenures which may be benefited or protected by the embankments.

(*b.*) To carry out that new principle, provisions are made for the due notification to the parties interested of the works proposed to be taken in hand, of the estimated and actual cost thereof, and of the amount of expenses payable by each class, and also for the recovery by Government of the cost from the zemindars, and for the reimbursement to the zemindars of the proportion payable by the proprietors.

(*c.*) Provision is made in Part III. for immediate action in certain cases of emergency.

(*d.*) The procedure for the acquisition of land in such cases, and for the determination of compensation for consequent damages, is described in Part V. of the Act.

(*e.*) The Act also contains a new feature in bringing under the control of the Collector the management, improvement, and alteration of water-courses in certain cases; and, as there is reason to suppose that much of the insalubrity of portions of the country is due to defective drainage, the attention of Collectors is especially drawn to the power for good in this respect now placed in their hands.

No. 2.

Alterations in the Test Table of Table III., Return No. XXXI.

OWING to the addition of two columns to Table III. of Return No. XXXI., the following alterations should be made in the Test Table for that Return :—

Insert "Test 27A.—Is the entry in column 3 fully explained in the separate sheet?"

To Test 28 should be added the words, "and do the figures represent only the debts which have accrued during Government management?"

Insert "Test 28A.—Are the figures in column 6 the total of those in column 5 of this Return and those in column 6 of the previous year's Return?"

In Test 29 substitute "7" for "5."

In Test 30 substitute "8," "7," and "8" for "6," "5," and "6," respectively.

In Test 31 substitute "9," "10," and "11" for "7," "8," and "9," respectively.

In Test 32, in the first line, substitute "12" for "10."

In Test 32, in the 2nd line, substitute "9," "10," and "11" for "7," "8," and "9," respectively.

In Test 32, in 2nd and 3rd lines, for the words, "the entry in column 2," substitute the words, "the total of the entries in columns 2 and 4."

In Test 32, in 3rd line, for the figures "4" and "6," substitute "6" and "8," respectively.

No. 3.

Enjoins Observance of Previous Ruling of Board that a Collector should not delegate to any of his Subordinates the Duty of holding Sales of Putnee Tenures.

IT was ruled by the Board in the year 1867 that, under section 3, Act VIII. (B.C.)

of 1865, a Collector could not delegate to any of his subordinates the duty of holding sales of putnee tenures. This ruling, however, does not appear to have been circulated for general information, and instances have recently come before the Board where such sales have been irregularly conducted by Deputy Collectors. The attention of Collectors is, therefore, drawn to the necessity for a strict observance of the law in future.

No. 4.

Denomination of the Coins cut, &c., should be specified in half-yearly Report on the working of the Rules under the Indian Coinage Act (XXIII. of 1870).

WITH a view to obviate frequent calls for explanation, which the Board now find it necessary to make, District Officers are requested, when submitting the half-yearly report on the working of the rules for carrying out the provisions of the Indian Coinage Act (XXIII. of 1870), prescribed by Circular Order No. 2 of November 1873, invariably to specify the *denomination* of the coins cut or broken or withdrawn from circulation.

A. MONEY, ESQ., C.B.

No. 5.

Calls for Report regarding number of Stamps required to be re-punched monthly in the Courts at Head-quarters and Sub-divisions, and asks whether any inconvenience is felt in carrying out Orders on the point.

DISTRICT OFFICERS are requested to report at once, through the Commissioners of their Divisions, how many stamps, on a rough average, are required to be re-punched monthly by the Record-keepers of the several Courts at head-quarters and sub-divisions, in accordance with the orders of Government communicated with the Board's Circular Order No. 3 of August 1873; and to state whether any inconvenience is felt in giving effect to those orders.

No. 6.

Points out how Joint Licenses for the Sale of Country Spirits and Rum, together with the License Fees realized, should be shown in Return No. XIV. Makes an alteration in that Return and in Return No. XLII.

THE number of joint licenses now issued for the sale of both Country Spirits and Rum, together with the license-fees realized, are, under present practice, entered in Returns Nos. XIV. and XLII. against the heading II*b* (Rum), and the revenue from that article is thus shown to be more than it actually is. This system is wrong, and should be rectified.

2. The District Officers concerned are therefore requested to enter in their Returns under notice, against the heads of Country Spirits and Rum respectively, a proportionate number of the joint licenses, together with the license-fees, regulated by the quantities sold of each sort of spirit. Thus, if ten joint licenses fetch Rs. 100 a month, and the sale of Country Spirit amounts to 800 gallons, and that of Rum to 200 gallons, eight of these licenses should be shown against Country Spirits together with Rs. 80, and the remaining two licenses with Rs. 20 against Rum.

3. The change comes into effect with the Returns for 1873-74. Revised figures for headings I*a* and II*b* of Return No. XIV. for the quarters ending 30th June and 30th September should be submitted by the Officers concerned as soon as possible.

4. In instructions *e* and *f* at top of Table I. of Returns Nos. XLII. and XIV., respectively, the words "under heading II*b*" should be altered to "agreeably to C. O. No. 6 of January 1874."

HON'BLE V. H. SCHALCH.

Amounts spent for Charitable Dispensaries and Schools out of Funds of each Ward's or Attached Estate to be shown separately in Return No. XXXI.

No. 7.

BESIDES the information required by Circular Order No. 7 of April 1873, District Officers will, for the future, show separately, in Return No. XXXI., the amounts that may have been expended during the year from the funds of each Ward's or Attached Estate in the support of (1) charitable dispensaries, and (2) schools.

Substitutes a New Rule for clauses 3, 3A, 6, and 7, section 3, Chapter VIII., page 852 of Board's Rules, regarding Revenue.

No. 8.

CLAUSES 3, 3A, 6, and 7, section 3, Chapter VIII, page 852 of the Board's Rules, are hereby cancelled, and the following substituted :—

3. Proprietors of estates situated in the districts of Chittagong and Sylhet, and assessed to a Government revenue not exceeding one rupee, and proprietors of holdings in Calcutta, Panchannagram, and Chinsurah, may redeem all future payments by one payment of twenty-five times the revenue of such estates or holdings.

FEBRUARY 1874.

HON'BLE V. H. SCHALCH.

Erratum.

In line 1 of Board's Circular Order No. 8 of January 1874, for "852" read "152."

Modifies form of the Wards' Establishment Bill prescribed by Circular of November 1873.

No. 1.

THE Government of India, in Financial Resolution No. 3750 of 17th December 1873, having altered the wording of the certificate to be attached to bills for contingent charges, the form of the Wards' Establishment Bill prescribed in Circular Order No. 9 of November 1873 has been modified.

Indents should be made on the Superintendent of Stationery for the modified form, which should invariably be used in future.

Prescribes Form of Diary in which Reports on the working of the Rules under the Indian Coinage Act are to be submitted.

No. 2.

THE following form is prescribed as that in which District Officers should submit the reports on the working of the rules for carrying out the provisions of the Indian Coinage Act (XXIII. of 1870) required by Circular Order No. 2 of November 1873 :—

1		2		3		4		5
Believed to be Counterfeit.		Believed to have been reduced in weight otherwise than by reasonable wearing.		Believed to have been lost by reasonable wearing more than two per cent. in weight.		Considered unfit for further circulation by reason of Obliteration of Device, or for other cause.		REMARKS.
Rupees.		Rupees.		Rupees.		Quarter Rupees.		
Half Rupees.		Half Rupees.		Half Rupees.		Two-anna Pieces.		
Quarter Rupees.		Quarter Rupees.		Quarter Rupees.				
Two-anna Pieces.		Two-anna Pieces.		Two-anna Pieces.				

A New Heading "Nominal Remission" to be opened in Return No. X.

No. 3.

CIRCULAR ORDER No. 5 of October 1873 directed that remissions entered in Return No. X. should be classed under the two heads, (1) Remissions of right, and (2) Remissions of grace; but it has, in practice, been found that many cases classed as cases of remission do not properly fall under either of these heads. The most common instance is where a farm of some Government estate expires, and the estate coming under khas management, it is found to be uncultivated. The revenue paid by the farmer continues to appear as the demand against the estate, but has of course to be "remitted." Here, as the demand was never due from any one, the so-called remission cannot be treated as either "of right" or "of grace." Again, remissions are sometimes necessary owing to errors in account, revenue paid twice over, and the like. The Member in charge desires therefore that, except when a remission represents a specific sum at one time really due from a specific person, but which, for good cause and under competent authority, it has been determined to forego, such remission should be classed under a third head, and appear as a "nominal remission."

A. MONEY, ESQ., C. B.

Circulates Financial Department Orders of 31st January 1874 regarding Cancellation and Punching of Stamps.

No. 4.

IN continuation of the Board's Circular Orders marginally cited, the following orders of the Government of India, in the Financial Department, No. 831, dated 31st January 1874, are published for information and guidance:—

No. 3 of August 1873.
" 3 of October "

It has been brought to the notice of Government that the provisions of section 30 of the Court Fees Act (VII. of 1870), regarding the cancellation of stamps, are not in all cases strictly observed, and that consequently stamps are liable to be fraudulently used a second time.

2. It is therefore requested that, with the permission of his Honor the Lieutenant-Governor, you will be good enough to impress, upon all Courts and Officers having to deal with Court-fee stamps, the importance of punching out from the stamps the figure head, and destroying the piece, before taking action upon the documents to which the stamps may be attached.

3. The Member in charge desires that each District Officer will at once communicate the present Government orders direct to every one of his subordinate officers who receives petitions or other papers bearing a Court-fee stamp, reporting to the Commissioner of the Division, in due course, that this has been done. The personal responsibility of the officer who gives any order to see that the stamp affixed under Act VII. of 1870 is punched *before* he takes such action is clear from section 30 of the Act, and must be enforced.

f

[MARCH 1874.

HON'BLE V. H. SCHALCH.

Rate per acre of each denomination of soil to be entered, in addition to the rate per beegah, in Abstract Statement No. 20.

No. 1.

DISTRICT OFFICERS are requested, when submitting, in accordance with clause 1, section 12, Chapter XX., page 287, of the Board's Rules, Abstract Statement No. 20, to show in column 2 of Table B., in red ink, the rate per acre of each denomination of soil entered in column 1 of that Table in addition to the rate per beegah.

Alteration in Clause 12, Section 2, Chapter XXV., page 341, Board's Rules, regarding converting securities into a book debt in the Bank of Bengal.

No. 2.

THE following alteration has been made in clause 12, section 1, Chapter XXV., page 341, Board's Rules—

After the words "in value" in the sixth line, substitute for the rest of the clause the following sentence: "In which case Collectors should consider the possibility of converting the securities into a book-debt in the Bank of Bengal in accordance with the Notification of the Government of India, Financial Department, No. 44, dated 10th January 1867, published at page 39 of the *Gazette of India* for that year."

Expunges part of Circular Order No. 3 of May 1872 regarding settlements.

No. 3.

CLAUSE 4, section 8, Chapter XX., page 282, of the Board's Rules, having been cancelled by para. 8 of the revised orders No. 36A., dated 17th January 1874, circulated with letter No. 71A., dated 6th February last, the words in the latter part of Circular Order No. 3 of May 1872, as noted on the margin, should be expunged.

"and that arrangements for its payment "at future settlements "should continue to be "effected, at any rate, "until the Road Cess Act "is in full operation."

Draws attention to Part X., Act IV. (B.C.) of 1870, with reference to suits on behalf of estates under the Court of Wards.

No. 4.

It has been brought to the notice of the Member in charge that in many cases the provisions of the law in regard to the institution and defence of suits on behalf of estates under the superintendence of the Courts of Wards are not observed with sufficient care. Mr. Schalch, therefore, desires to draw the particular attention of District Officers to Part X. of Act IV. (B.C.), 1870.

Section 72 of that Act requires that every suit (except suits in the High Court), brought on behalf of a ward, shall be authorized by some order of the Court in charge of such ward. An injunction to this effect is reiterated in clause 13, section 1, Chapter XXV. (page 341) of the Board's Rules. A copy of the order should invariably be sent with the draft plaint to the Legal Remembrancer.

Again, under section 69 of the Act, the ward must (except in suits before the High Court) sue or be sued in his own name, describing himself, or being described, as a ward of Court; and, as a rule, the manager must be named as next friend. Accordingly the following form should be adopted in plaints on behalf of a ward of Court—

"A. B., ward of the Court
"of Wards, inhabitant of , by
"C. D., inhabitant of ,
"manager of the estate of the said ward of
"Court, sues E. F., &c."

Similarly, in cases where the ward is defendant, the answer should be in the following form—

"A. B., inhabitant of ,
"sues C. D., inhabitant of ,
"ward of the Court of
"Wards, of whom E. F., inhabitant of
" , the manager of the
"estate of the said ward, is next friend"
or "guardian."

A. MONEY, ESQ., C. B.

Circulates Financial Department Order No. 661, dated 29th January 1874, allowing officers to charge in the accounts the value of service postage stamps ¾ths to the Revenue, and ¼th to the Judicial, Departments.

No. 5.

THE following orders of the Government of India, in the Financial Department, No. 661, dated 29th January 1874, are published for information and guidance by order of the Lieutenant-Governor of Bengal—

"The Governor-General in Council is "pleased to allow the several Local Govern-"ments and Administrations to authorize, "whenever they think necessary, District "Officers to charge in the accounts the "value of the service postage stamps pur-"chased by them, in the fixed proportion of "three-fourths to the Revenue, and one-"fourth to the Judicial, Departments. "Whenever the cost of an establishment is "divided between two heads, the charge for "service postage labels may be divided in "the same proportion, care being taken to "secure every possible economy."

h

HON'BLE V. H. SCHALCH.

Explains what should be contained in Reports on Wards' Estates prescribed by Board's Circular of June 1873.

No. 6.

As some doubt appears to exist what estates should be included in the Report on Wards' Estates prescribed by Board's Circular No. 2 of June 1873, the nature of which was further explained in the Circular* to Commissioners dated 1st September following, it is hereby directed that such Reports should embrace all estates managed by the Court of Wards, all estates managed by the Revenue Authorities under orders of the Civil Court passed in accordance with the provisions of Acts XXXV. and XL. of 1858, all estates attached under orders of the Civil or Criminal Courts or under general or special orders of Government, and all estates held in trust by Government.

* (To Orissa), No. 208A. (To others), No. 699A.

Addition to Chapter XIII. (Division III.), page 213 of Board's Rules.

No. 7.

As it is unnecessary to preserve petitions for sales under Regulation VIII. of 1819, which are struck off on payment of the zemindar's demand, the following should be inserted in the Appendix to Chapter XIII. (Division III.), page 213 of the Board's Rules:—

After the words "all petitions" add "(excepting those for sales under Regulation VIII. of 1819, which are struck off on payment of the zemindar's demand, which should be placed under class *c*)."

States how "Sale-proceeds of Waste Papers" and certain other particulars are to be shown in Table V. of Return No. X.

No. 8.

"SALE-PROCEEDS of Waste Papers" from the Collector's office form a part of "Miscellaneous Land Revenue" as laid down in clause 5, section 7, Chapter XIII., page 212 of the Board's Rules; and District Officers are informed that, in future, this item of revenue should be shown under heading (*k*), Table V. of Return No. X.

Note 3 at foot of Table V. is cancelled, but it should be remembered that, under the heading (*k*), there should only be shown items which are admittedly items of miscellaneous land revenue, and which do not fall under any of the preceding headings; and that the nature of these items must be explained in Table IV.

A. MONEY, ESQ., C. B.

Addition to Rule 29, page 71 of Salt Manual.

No. 9.

THE following should be added as clause 2 to Rule 29 at page 7 of the Salt Manual:—

At places situated at a long distance from

the Collectorate or the Sub-divisional Office, the Collector is further empowered to entrust the distribution of the forms, duly signed and sealed, to the Police in charge of the Division within the limits of which the salt is stored at the time for sale.

Para. 28 of the Instructions for the Administration of the Land Acquisition Act (X. of 1870) cancelled.

No. 10.

UNDER the orders of Government, para. 28 of the Instructions for the Administration of the Land Acquisition Act (X. of 1870) is hereby cancelled.

APRIL 1874.

THE HON'BLE V. H. SCHALCH.

When an Estate is re-settled, Steps should at once be taken to secure the Execution of the Agreement, with the Proviso for subsequent Revision prescribed by para. 9 of Revised Settlement Rules.

No. 1.

THE Member in charge has noticed that, in some cases, para. 9 of the Revised Settlement Rules, circulated with Board's Order No. 419B, dated 24th July 1872, has not been strictly observed, and that, when estates are re-settled, the acceptance of the revised assessment is allowed to stand over until the settlement-holder signs the final agreement. Mr. Schalch, therefore, draws attention to the rule, and requests that, when an es re-settled, steps may at once be taken to the execution of the agreement, wit proviso for subsequent revision pres in the rule just cited. Any delay part of persons with whom settleme been concluded to sign such agre should be reported for the orders Board.

Alteration in clause 5, section 7, Ch XIX., page 268 of the Board's Rules.

No. 2.

THE words "that they are the heirs parties so registered," at the end of clause section 7, Chapter XIX., page 268 of t Board's Rules, are hereby expunged.

Data on which Proposed Rate for each class land is calculated to be fully recorded in Settl ment Reports.

No. 3.

THE Member in charge has lately ha occasion to notice that the data on whic rates are fixed are very inadequately set fort in Settlement Reports. In some cases it h even been thought sufficient to justify th rates proposed by a comparison of the *average* incidence with the *average* incidenc of rates for all classes of lands in adjoinin estates or villages. No guide could be mo fallacious than this. Mr. Schalch, therefor draws particular attention to clause 2, sectio 7, Chapter XX. of the Board's Rules (pag 277), and requests that, in all future settl ments, care may be taken to record full the data on which the proposed rate for *eac class* of land is calculated.

b

...ion to clause 3A, section 21, Chapter, VIII., ...rd's Rules, regarding Transmission by Post ... Covers containing Transfer Receipts for ...yment of land revenue.

No. 4.

...E following is added as clause 3A, ...n 12, Chapter VIII., page 155, ...d's Rules :—

...vers containing transfer receipts on ...nt of the payment of land revenue ...ld only be forwarded at the public ...nse when the payment is made in a ...ict other than that to which it belongs ... the convenience of Government, but ...e the payment is so made for the ...venience of the payers, postage on the ...ers forwarding the transfer receipts must ...er be paid by them, or they should be ...uired to forward them direct at their ... cost.

A. MONEY, ESQ., C.B.

...terations in Excise Form No. 26 and Register No. 82, regarding Fee for Opium Licenses.

No. 5.

OFFICERS in charge of Districts where a ...e for opium licenses is now levied are ...quested to make the following alter...ions :—

1st.—In Excise Form 26, pages 97 and 98, ...ard's Rules, for last para. of Clause 12, ...bstitute "13, That he pay to Govern...nt a fee of Rs. ."

2nd.—In Register No. 82, page 226, ...ard's Rules, add a column (6) with the ...ading "Amount of License Fee."

MAY 1874.

HON'BLE V. H. SCHALCH, C.S.I.

...bstitutes New Form of Application for the one subjoined to clause 3, Chapter VI., section 10, page 127 of Board's Rules.

No. 1.

UNDER instructions from Government, the ...llowing form of application is substituted for the one now subjoined to clause 3, Chapter VI., section 10, page 127 of the Board's Rules :—

Year.	Revenue.		Charges.		Total.		Net.	
	Ordinary.	Extraordinary.	Ordinary.	Extraordinary.	Revenue.	Charges.	Surplus.	Deficit.

Extract from Home Department of Govt. of India.		Office to which the Proposition refers.	Nature of Charge.		Proposition.						Grounds of Proposition.	Local Government's Recommendation.	Orders of the Government of India.		
					Permanent.		Temporary.						Home Dept.	Finl. Dept.	
Number.	Date.		Present Scale.	Proposed Scale.	Increase per Month.	Decrease per Month.	Period.	Increase per Month.	Period.	Decrease per Month.			Remarks.	Remarks.	Orders.

Circulates Extract from a Government Order regarding the Investment of the Surplus Cash of Wards' Estates in general.

No. 2.

THE following extract from a recent order of Government is published for the information and guidance of District Officers in charge of estates under the management of the Court of Wards :—

"Until further orders, the surplus cash of "".....and (Wards) estates in general are, "as they accrue, to be invested in Govern- "ment Securities, and not at all in the "purchase of additional estates."

Heading for "Kharcha hisabs" under Khas tehsil to be added to the Appendix to Chapter XIII., page 213 of Board's Rules.

No. 3.

As it is desirable to preserve "Kharcha hisabs" of estates, the property of private individuals, held under Khas tehsil, the following addition is made to heading V. (b), Class A in the Appendix to Chapter XIII. (page 213) of the Board's Rules:—

"and 'Kharcha hisabs' of estates, the "property of individuals under Khas tehsil."

JUNE 1874.

HON'BLE V. H. SCHALCH, C.S.I.

Estates under the Direct Management of the Collector are liable to Zemindaree Dak Cess.

No. 1.

As some misconception has been found to prevail in regard to the levy of zemindaree dâk cess from estates under the direct management of the Collector, attention is drawn to clause 3, section 8, Chapter XX., page 282 of the Board's Rules, which lays down that such estates are not exempted from the payment of the rate under section 3, Act VIII (B. C.) of 1862. The Collector managing a Government estate is exactly a "zemindar, sudder farmer *or other person* paying rent to Government" within the meaning of the Act.

Farming leases in future to contain a clause reserving to the Collector a right to cancel the Deed on the Farmer becoming bankrupt or allowing the Lease to be sold in Execution.

No. 2.

IT appears that, under the law, the covenant contained in a lease granted to a farmer of a Government estate, not to sell the estate, or to under-lease it, either wholly or in part, does not protect the lease from sale by the Civil Court on execution of decree. The practical effect of this is that the Courts may often substitute, in the place of a farmer carefully selected by the Government, any man, be his character what it may, who simply bids highest at the sale. To remedy this defect, the Member in charge desires that, in future farming leases, a clause should be added reserving to the Collector a [illegible] to cancel the deed on the farmer bec[illegible] bankrupt, or allowing the lease to be s[illegible] execution.

A. MONEY, ESQ., C.B.

Alterations in the Rules in consequence of [illegible] fees Stamps being sold in future by Li[illegible] Vendors instead of by Official Vendors.

No. 3.

THE result of the experimental intr[illegible] tion of the syst[illegible] Stamps. *official* vend[illegible] Court-fees *St[illegible]* with reference to Act VII. of 1870, in[illegible] Districts of the Lower Provinces, h[illegible] shown that the convenience of the p[illegible] cannot be sufficiently met thereby, the [illegible] tion of Government has now been obta[illegible] to revert, in all Districts (excepting Calc[illegible] where special salaried vendors are appoin[illegible] to the former system of sale by *lic[illegible]* vendors.

2nd.—It is accordingly necessary to c[illegible] para. 6 of the Rules under section [illegible] Act VII. of 1870, published with the Bo[illegible] Circular Order No. 8 of June 1872, a[illegible] substitute for it the following Rule:—

"6.—Licensed Vendors at all H[illegible] Quarters and Sub-Divisional Stations. [illegible] chasing stamps of the total value of R[illegible] or upwards, at one time, are allowed a[illegible] count not exceeding 1½ per cent. Bu[illegible] discount is allowed on purchase of any s[illegible] of which the value is more than Rs. [illegible] Stamps above that value are always pro[illegible] able from the Collector and from Sub-[illegible] sional Officers."

3rd.—Also, for the words "receipt a[illegible] custody" in para. 4 of the present Rul[illegible] the following words are to be substituted: "receipt, custody, issue from the Collecto[illegible] store, and the retail"(1) * * * *

4th.—The Commissioner of each Divisi[illegible] will make the necessary arrangements f[illegible] reverting to the system of licensed ven[illegible] inviting vendors to apply, through the Di[illegible] trict Officers, for licenses to sell Court-fee[illegible] Stamps on a fixed discount allowance of 1[illegible] per cent.

5th.—The sanction of Government [illegible]

(1) Rule 7A in section 4 of Chapter XXI. of the Board's Rules is not, however, applicable.

been received to the continuance of of discount at 6¼ per cent. on the the special description of paper to in the Board's Circular Order of November 1872, to be used for ents under Act VII. of 1870: and ficers are directed to carefully super- e working of the scheme, to ascer- hether any extortion is practised by s of the paper in demanding from sers more than the fixed price of 1 er sheet.

—With reference to these instructions, Commissioner will prepare and submit a al statement of the amounts of discount ated to be paid in each District of his on during the current official year, for no provision has been made in the et Estimates for 1874-75.

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regarding the levy of stamp duty on depositions and documentary exhibits in cases.

No. 4.

As it appears from reports received that a ersity of practice exists with respect to levy of stamp-duty on depositions and umentary exhibits in cases, Divisional and trict Officers are requested to observe in ure the following rule:—

Copies of depositions, and also copies of ocuments coming within the description of ocuments mentioned in clause 9, Schedule ., Act X. of 1870, as "accounts, statements, eports, or the like," taken out of any Civil or Criminal or Revenue Court or office, or from the office of any Chief Officer charged with the executive administration of a Division, should bear a stamp under the provisions of the aforesaid clause, the value of which should be computed according to the number of words contained in the deposition or document, at the rate of eight annas per every 360 words or fraction of 360 words.

Copies of documents not falling within the above-mentioned description are dutiable under clause 23, Schedule I., Act. XVIII. of 1869. For example, the copy of a bill of sale should be stamped under the latter Act, while the copy of an Ameen's report would require a stamp under clause 9, Schedule I. of Act VII. of 1870.

Register No. XXVI. to show how, and when, lands, the property of Government, have been acquired.

No. 5.

DISTRICT OFFICERS are requested in future to show in the column of remarks of Register No. XXVI. how lands, the property of Government, have been acquired, whether under the Land Acquisition Act or by private purchase, and the dates on which such lands were acquired.

Salt char-chittee forms how to be printed, &c.

No. 6.

SALT CHAR-CHITTEE FORMS will, in future, be printed with a counterfoil, and bound up in books of 100 each. Before the books are issued by the Collector to wholesale vendors, the pages must be signed, sealed, and numbered as prescribed in Rule 2 at page 17 of the Salt Manual.

When a wholesale vendor returns a rowannah to the Collector on completion of the sale of the salt covered by it, he must at the same time return the counterfoils of the chars under which the salt has been sold.

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